IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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

NO. 2008-TS-02011-SCT

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 as employer and/or principal of Agent Richard Earl Schmidt; and NATIONWIDE PROPERTY &CASUALTY INSURANCE COMPANY — **APPELLEES**

ON APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

It will be remembered that the claims of the Appellants, John and Sherry Mladineo (collectively "The Mladineos") arise initially and primarily out of the gross negligence of Richard Earl Schmidt ("Schmidt"), a licensed professional insurance agent for Nationwide Property & Casualty Company ("Nationwide"), in failing to perform his basic legal duties and otherwise committing multiple acts of negligence during what should have been the process of procuring for the Mladineos the specific insurance coverage requested of Schmidt. The Mladineos further maintain that some (but not all) of those acts of negligence also constitute negligent misrepresentation. In their Brief, Appellees (collectively, "The Nationwide Parties") have attempted to deflect the Court's attention from a consideration of the totality of Schmidt's negligent acts (and the Mladineos claims for failure to procure arising out of same) towards only one aspect of those acts during the process, the acts of misrepresentation. The Mladineos are confident the Court will consider all their claims, and the facts underlying those claims, in their entirety.

The Nationwide Parties seem to treat this case as just another Katrina case, apparently hoping that the Court will consider closed the questions and issues raised by this case and dispose of it accordingly. The facts out of which this case arise, and the conflicting principles of law applicable to those facts, are distinctive and unique to this case, requiring the Court's close, careful and thoughtful analysis of, among other issues, the interplay of the breach of an agent's duty to procure the specific coverage requested, on the one hand, and the so-called "duty to read" on the other. This analysis should include and involve considerations of public policy as well as simple common sense and fairness.

It is readily apparent that the facts relating to what should have resulted in the agent's procuring the coverage specifically requested are of paramount importance. The importance of the facts is reflected by the extensive discussion of the Appellee's "version" of the facts in their Brief, although in the end, they claim the facts do not matter. If the facts do not matter, why spend the Court's time with another "version" of the facts? The facts are crucial to determining the interplay of the various legal principles in this case. It is obvious they are genuinely disputed, and, under the claims as couched in this case, they are material, as argued in Appellants' affirmative Brief. A jury should determine what the disputed facts are, and how damages should be apportioned, if at all, between the Mladineos and the Nationwide Parties.

Finally, the Nationwide Parties' arguments regarding the waiver issue and the Mladineos' claims for inadequate investigation and Nationwide's wrongful denial of the Mladineos' claims against the agent, and for its own liability, are without merit, as will be later more fully shown.

The Mladineos ask this Court to reverse the summary judgment entered by the Trial Court, and allow the matter to proceed to trial.

II. CONTRARY TO THE NATIONWIDE PARTIES' ASSERTIONS, THE "DUTY TO READ" DOES NOT, AS A MATTER OF LAW, EITHER RELEASE AN AGENT FROM HIS DUTY TO EXERCISE REASONABLE CARE IN PROCURING SPECIFICALLY REQUESTED INSURANCE COVERAGE OR RELIEVE HIM FROM LIABILITY FOR DAMAGES PROXIMATELY CAUSED BY HIS BREACH OF THAT DUTY; THERE ARE DISPUTED MATERIAL FACTS TO BE CONSIDERED AND DETERMINED BY A JURY REGARDING THOSE ISSUES AND THE ISSUE OF CAUSATION.

The Nationwide Parties recognize the duty of an agent to procure the insurance requested by his client or customer[1] and admit that "[a]ny negligence or breach of that duty of the agent which

[1] "Under applicable Mississippi law, an insurance agent or broker who undertakes to procure insurance for a customer is under a duty to the prospective purchaser to exercise reasonable care. *McKinnon*

operates to defeat the insurance coverage requested may render the agent liable for any resulting loss." Appellees' Brief, p. 28 (citing *Simpson v. M-P Enters., Inc.*, 252 So. 2d 202, 207 (Miss. 1971). The Nationwide Parties then argue that "there is no indication" that Schmidt failed to exercise reasonable care to procure insurance conforming to the request of the Mladineos. Appellees' Brief, p. 28. Contrary to this contention of the Nationwide Parties, many of the actions that an agent should take to meet the standard of reasonable care, and Schmidt's breach of those standards, are set forth on page 8 of Appellants' affirmative Brief.[2] Of perhaps even greater significance is what coverage the Mladineos asked Schmidt to procure for them over the course of many extensive telephone conversations. The Mladineos contend that Schmidt would have procured the insurance they requested had he followed those standards of care.

The Nationwide Parties, for the first time during the course of this case, apparently recognize the importance of the facts, since they expend eight (8) pages in their Reply Brief (pp.1-9) contradicting the facts as recited by the Mladineos, and setting forth their own understanding of what

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v. Batte, 485 So. 2d 295 (Miss. 1986); *Lovett v. Bradford*, 676 So. 2d 893 (Miss. 1996); *First United Bank of Poplarville v. Reid*, 612 So. 2d 1131 (Miss. 1992). An insurance agent who undertakes to procure insurance for a customer and to give his advice concerning the coverages an insured should purchase in circumstances where the advice is reasonably relied upon by the prospective insured, the insurance agent may incur liability if the advice is the product of a failure on the part of the agent to exercise reasonable care or if the agent fails to use reasonable care to obtain the type of coverage the customer has requested." *Smith v. Nationwide*, 2009 WL 736199 (S. D. Miss. Mar. 18, 2009).

[2]In addition to misrepresenting the terms of the policy that Schmidt recommended to the Mladineos Schmidt failed to follow agency standards and practices which he had been taught and was expected to follow. Depo. Michael Felsher 24:14-17 (to create a customer file), 25:8-13 (to obtain a signed application), 30:1-10 (to explain the coverages and exclusions of a policy being sold), 34:10-15 (to provide a sample policy), 38:11-17 (to make an independent determination if a customer's property was in a flood plain), 39:7-16 (to encourage all customers to purchase flood insurance), 46:4-12 (to perform a complete inspection of the property to be insured), 51:14-52:12 (to encourage the customer to purchase a flood policy if the agent knew the property to be insured was in a flood plain), 54:1-13 (to specifically explain the exclusions regarding storm surge and to offer flood policies to all customers), 80:9-84:1 (to inform a customer that part of his property was in a flood plain, to explain that flood was excluded by a homeowners policy and to offer a flood policy) (Jan. 11, 2008).

the facts are. A review of the Nationwide Parties' version of the facts versus the Mladineos' version of the facts shows that there are a multitude of disputed material facts that must be determined by a jury.

Regarding John's request for coverage, the Mladineos have always stated that John made a very specific request for coverage from all damage from all wind and water from all storms to cover their home in Ocean Springs, Mississippi located on the backwaters of Biloxi Bay. Appellant's Brief, p. 6. The Nationwide Parties describe the residence at issue as the Mladineos' "vacation home." Appellees' Brief, p. 8. Rather, the Mladineos purchased the residence with the full intention of selling their home in Jackson, moving to the Gulf Coast and using the Ocean Springs home as their primary residence. *See* Depo. John Mladineo 32:4-18 (Mar. 4, 2008). The Nationwide Parties' description of the Mladineos' home as a "vacation home" is blatantly false. The Nationwide Parties also allege that John "advised Schmidt that he had Nationwide coverage on his Jackson home and wanted to continue with that coverage for his new home." Appellee's Brief, p. 3.[3]

Later, in Section III(B)(4) of their Brief, the Nationwide Parties suggest that the Mladineos "requested 'full coverage' or a 'hurricane policy,' or somehow surmised that their policy 'covered everything.'" Appellees' Brief, p. 23. These suggestions constitute a serious mischaracterization of the sworn testimony in this case. The Mladineos have always stated and argued that John's request for coverage from Schmidt was succinct and specific: coverage for all wind and water damage from all storms. The Nationwide Parties probably suggest that the Mladineos request was limited to asking for "full coverage" to enable them to cite a favorable (to them) line of cases relating to such a request. Furthermore, the Nationwide Parties make the strange assertion that "[i]f John

[3] The Nationwide Parties' phrasing of John's testimony is misleading. John stated that he wanted to continue with coverage by Nationwide Insurance Company, not that he wanted to continue with the same type of coverage.

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." Appellees' Brief, p. 24. The fact of the matter is that John **did** make a specific request for the coverage he wanted. That he did not use the word "flood" is irrelevant. Moreover, the Nationwide Parties' claim that John "**assumed**" that the policy covered storm surge is not true. Appellees' Brief, p. 24. John has testified that Schmidt affirmatively represented that the policy would provide such coverage. John made no assumptions. He relied on Schmidt's specific representations. Additionally, John maintains that his requests for coverage were "clear and succinct," while the Nationwide Parties argue that there was a "misunderstanding" or a "miscommunication." Appellees' Brief, pp. 9, 28. Yet, the Nationwide Parties admit that John requested coverage from wind and water damages. R. V. 14 at 1967 (Schmidt's response to Interrogatory No. 15).

Clearly the parties do not agree on the facts surrounding the Mladineos' request for coverage. Whether there was a specific request for coverage, and if so, for what, and whether the agent procured coverage conforming to that request are questions of fact material to the Mladineos' claims for failure to procure and for misrepresentation. These facts should be decided by a jury.

The parties also have diverging accounts of the nature of the dealings between John and Schmidt. The Mladineos have continually described the discussions between John and Schmidt as extensive, and included the details of insurance coverage, including coverage for other structures, policy limits, deductible amounts, etc. During these discussions, Schmidt introduced and defined the terms "named storms" and "hurricane policy" – which John had never heard of previously. *See* Appellant's Brief, pp. 6-7 (Schmidt admits that "John asked a lot of questions" and was more inquisitive than most, particularly regarding hurricane damage, and Schmidt felt that John was relying on his answers to make a decision in purchasing insurance coverage.). In their Brief,

however, the Nationwide Parties claim that the dealings between John and Schmidt were "brief." Appellees' Brief, p. 2.

Further, while the Mladineos have consistently testified that Schmidt recommended a "hurricane policy" and that he specifically represented that such a policy would provide coverage for all wind and water damage from a named storm, Schmidt disputes that he ever used the term "hurricane policy" or that he represented that it would provide coverage for storm surge. Appellees' Brief, p. 8. The Nationwide Parties have contended that Nationwide does not sell a "hurricane policy," implying that Schmidt would not have offered a "hurricane policy."[4] It is also important to note that the Nationwide Parties inaccurately describe the policy as containing a "Hurricane Deductible Endorsement," when the actual title of the document is "Hurricane **Coverage** and Deductible Provision Endorsement." Appellees' Brief, p. 5; Appellants' Brief, p. 9.

Also disputed are Schmidt's representations regarding whether the Mladineos' property was in a flood plain. The Mladineos have always contended that Schmidt advised, "since you don't live in a flood plain the bank won't require a separate flood insurance policy." Appellants' Brief, p. 7. However, Schmidt contends that while he assumed the property was in a flood plain, he never expressed that belief to John, or offered a flood insurance policy to John. Appellants' Brief, p. 7. In fact, Schmidt testified that he routinely did not offer flood insurance prior to Hurricane Katrina.[5]

Additionally, there is a dispute as to John's stated impression of his discussions with Schmidt made after the fact to a third party. The Nationwide Parties contend that John stated to an adjuster

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[4] The Nationwide Parties claim that they have accepted the Mladineos' allegations that Schmidt offered a "hurricane policy" for purposes of their argument. However, the Nationwide Parties continually disputed that fact (as well as many others) and argued contrary facts throughout their Motion for Summary Judgment in the Trial Court and in their Brief in this Court.

[5] It will be remembered that a portion of the Mladineos' property is in a flood plain, a fact learned by the Mladineos only after Hurricane Katrina.

that he "believed his 'hurricane policy' included flood coverage." Appellees' Brief, p. 6. John's actual response to the adjuster, according to John, was, "I had purchased a hurricane policy, and my agent indicated that I had full coverage for wind and water damage from all storms." Depo. John Mladineos 51:5-16, 50:11-15 (Mar. 4, 2008). There is an obvious distinction between believing that the policy had coverage for storm surge versus the agent affirmatively representing that it did.

Of apparent importance to the Nationwide Parties is why John did not request a separate policy for flood insurance. According to John, since Schmidt had represented that the "hurricane policy" would provide the coverage he sought (i.e., all wind and water damage from all storms – which necessarily includes storm surge), there was no reason for him to request a separate policy for flood. The Nationwide Parties refuse to recognize this fact. The Nationwide Parties continue to assert that John "never affirmatively requested a flood insurance policy," that if John "wanted flood coverage, he needed to request it," and that "Schmidt never agreed to procure a flood insurance policy." Appellees' Brief, pp. 4, 24, 28. Apparently, the Nationwide Parties miss the point, or either refuse to acknowledge the point. John made a specific request for coverage from all wind and water damage from all storms, and Schmidt represented that the "hurricane policy" would provide such coverage. Why would John ask for additional coverage? Whether John used the word "flood" is merely a matter of wording and is totally irrelevant.[6] Or, to state it another way, John made a specific request for coverage and was relying on the agent's "expert advice" to recommend the policy or policies to provide such coverage.

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[6] Any storm damage (including damage from a hurricane) results from two basic sources: wind and water. These two sources can be subdivided into many categories: wind shear, straight line wind, tornado, etc.; rain, rising waters, storm surge, flooding, etc. However named, these two basic sources remain wind and water – which are responsible for **all** damage from storms. Thus, to make a request for insurance coverage for all damage from wind and water from all storms, which the Mladineos did, would appear to be correct and logical, and would include a request for coverage from flood damage.

The Nationwide Parties have gone to great lengths to ignore the actual facts of this case and to try to re-characterize (or mischaracterize) the facts in a way to make this case seem similar to one of many prior cases, such as *Leonard v. Nationwide Mutual Insurance Co.*, 499 F.3d 419 (5th Cir. 2007). In that case, Plaintiffs' complaint was that the agent should have gratuitously reviewed the needs of the policyholders and gratuitously advised them that they should consider flood insurance. *Id.* This is not such a case. Here, the Mladineos made a specific request for coverage and Schmidt failed to procure coverage conforming to that request.

Next, the Nationwide Parties argue that the mere "issuance and receipt" of a policy is enough to overcome allegations of negligence. The Nationwide Parties rely on *Atlas Roofing Manufacturing Co., Inc. v. Robinson & Julienne, Inc.*, 279 So. 2d 625 (Miss. 1973). However, *Atlas* does not provide that an insured's failure to read the policy automatically bars recovery for negligence against the agent. In fact, *Atlas* does not even contain the phrase "duty to read." Rather, it speaks in terms of "fair notice" and "ample time." *Id.* at 629. While the plaintiff's claims in *Atlas* were ruled to be barred, the case is distinguishable from the present case. In *Atlas*, the uncovered loss occurred approximately **two and a half years** after the policy provisions were disclosed in writing to the insured, and the first complaint of agent negligence was made over **five years** after the insured was notified of the actual terms. *Id.* at 626-27.

Additionally, the Nationwide Parties cite *Haggans v. State Farm*, 803 So. 2d 1249, 1252 (Miss. Ct. App. 2002), a case about which the parties simply disagree as to what it says on its face. This case has been fully analyzed in the Mladineos original Brief. *See* Appellants Brief, pp. 31-32. The point of contention revolves around the following passage:

> 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 the contents of an insurance policy. *Cherry v. Anthony, Gibbs & Sage*, 501 So. 2d 416, 419 (Miss.1987). Haggans failed to bring

> forth any evidence regarding whether he could have obtained contents coverage or what else he would have done. If no insurance could have been obtained, then a duty to procure insurance could not have been breached. Therefore, no genuine issue of material fact exists as to a breach of duty to procure insurance. Even if Price breached the duty, Haggans failed to set forth any issue as to causation of injury. Accordingly, summary judgment was appropriate.

Id. at 1252. The Mladineos read this passage to mean that the lack of causation was due solely to the fact that the coverage sought was unavailable, and the "duty to read" was mentioned as a mere aside. The parties could argue forever about what *Haggans* really means, but this Court has the ultimate word about whether the *Haggans* court found a lack of causation because the coverage the agent failed to procure was unavailable; or because Haggans failed to read his policy; or because Haggans did not submit any opposing affidavits stating what he would have done to protect himself had he known he did not have coverage; or because he was not more specific in his request to the agent; or a combination of some or all of these considerations. In any case, *Haggans* is distinguishable on several grounds: the coverage sought by the Mladineos (from all damages caused by all wind and water from all storms) was readily available; the Mladineos' request for coverage was specific rather than generic; the agent, during the course of his discussions with John regarding coverage, made repeated misrepresentations and erroneously described the coverage afforded by the policy he recommended; and Haggans failed to respond in any way to State Farm's motion for summary judgment. Because of the oddity of the facts in *Haggans*, and the ambiguity in the opinion, it is of limited precedential value.

The Nationwide Parties attempt to discount the value of *Smith v. Nationwide,* 2009 WL 736199 at *5, by offering the following quote from the opinion: "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." *See* Appellees' Brief, p. 35 (emphasis added). The Nationwide Parties' reliance on this quote is misplaced for two reasons.

First, the Mladineos did not make **inferences** concerning their insurance coverage. Rather, Schmidt affirmatively misrepresented and erroneously mischaracterized the terms of the coverage. Second, the Nationwide Parties fail to acknowledge that *Smith* distinguishes between a general, generic request for "full coverage" and a request for specific coverage, the latter constituting a viable cause of action for failure to procure, if the agent failed to provide such coverage. The Mladineos made a request of Schmidt for specific coverage, which he failed to procure; therefore, under Smith their claim is viable. In addition, Schmidt's misrepresentation and mischaracterization of the coverage can be construed as "rendering advice on matters of coverage" which *Smith* also recognizes as a viable action.[7]

Clearly, the Nationwide Parties' logic is flawed in coming to the conclusion that " *Smith* actually reaffirms the basis on which the summary judgment was correctly granted in this case. Appellees' Brief, p. 35. The circumstances in *Smith* were substantially different from the circumstances here.

Additionally, the Nationwide Parties' reliance on *Stephens v. Equitable Life Assurance Society of the United States*, 850 So. 2d 78 (Miss. 2003) and *Cherry v. Anthony*, 501 So. 2d 416 (Miss. 1987) is improper. In *Stephens*, the alleged misrepresentation occurred when the policyholders had the policy in their possession and policyholders waited **twenty-nine years** before complaining. In *Cherry*, the Court rejected the insured's claim that they had a reasonable belief of

[7] As part of Schmidt's negligence in advising the Mladineos concerning coverage after undertaking to do so and his negligence in failing to procure the coverage conforming to the Mladineos' specific request, Schmidt failed to offer a flood policy (and did not routinely offer flood policies prior to Hurricane Katrina), despite Nationwide's being under a contractual obligation with FEMA to do so and contrary to agency standards that Schmidt had been instructed to follow. Depo. Richard Schmidt 84:8-85:4 (Jan. 11, 2008); Appellants' Brief, pp. 62-64; Depo. Michael Felsher 39:7-16 (Jan. 11, 2008). It should also be noted that the Nationwide Parties themselves have offered conflicting sworn evidence as to whether Schmidt offered a flood policy to the Mladineos. *See* R. V. 4 at 588.R. V. 14 at 2100; R. V. 14 at 1968-1967 (Schmidt's response to Request for Admission No. 6); R. V. 14 at 1967 (Schmidt's response to Interrogatory No. 15).

coverage in the face of unambiguous policy terms; however, in deciding whether the chancellor had erred in failing to submit the claim of fraud to the jury, the Court found that there was no evidence of a misrepresentation. The Nationwide Parties reliance on *Payment v. State Farm Fire & Cas. Co.*, 2008 WL 5381925 (S.D. Miss. Dec. 18, 2008) is misplaced. The plaintiff, Payment, sought no relief against his agent; consequently, the case involved no questions of causes of actions against agents, only motions in limine to exclude evidence related to negligent acts of the agents, which the Court granted. *Id.* at *2. The agent was not even a party to the action. *Id.* The Mladineos suggest Appellee's characterization of *Payment* is misleading. Likewise, the Nationwide Parties' reliance on numerous cases from other jurisdiction which are obviously not binding on this Court is misguided.

Summing up this Point II, all parties have agreed that an agent is liable if he fails to exercise reasonable care in procuring the specific insurance coverage requested by his client, or if he is negligent in giving advice regarding coverage once he undertakes to do so. The agent is liable for damages proximately caused by his negligence, just as is the case with any other tort action. A fair analysis of the entire body of the applicable case law, viewed in the light of common-sense every day experiences, and influenced by a sense of fair play (meaning, at the very least, a level playing field) suggest that the "duty to read" rule applied as an absolute bar by the Trial Court, should not and cannot stand. If the "duty to read" is to be recognized and applied under the facts of this case, then it should be applied as a comparative negligence defense. Otherwise, once the insurer issues the policy in which the agent orders, whether or not it conforms to the request of the client, the agent is given a "free ride" and the entire risk and burden of the transaction is placed on the client/customer who, here, and in most instances, is the party least familiar with insurance transactions. Another inquiry is whether the client/policyholder acted in a reasonable time and manner to satisfy himself

that the coverage provided by the agent actually conformed to his request. That obligation of the client/policyholder can be expressed as a "duty to read" the policy or policies within a reasonable time of their issuance. The issue of what time is a "reasonable time" is one for the finder of fact. A jury should be allowed to determine the cause or causes of the damages suffered and apportion the damages as between the agent's negligence on the one hand, and on the other, any negligence of the plaintiff/policyholder arising out of "duty to read" considerations, after being fully instructed on the principles of law. The jury compares negligence to negligence without having its analysis of the issues distorted by a principle of contract law. The jury could find that Schmidt's negligence alone proximately caused the Mladineos' damages, or the jury could find that Schmidt's negligence is partly to blame and the Mladineos not reading their policy within a reasonable time is partly to blame, or the jury could find that the Mladineos' failure to read their policy within a reasonable time was the sole proximate cause of their damages.

For the foregoing reasons, the Mladineos request that the summary judgment entered by the Trial Court should be reversed, and the case remanded for trial.

III. CONTRARY TO THE ARGUMENT OF THE NATIONWIDE PARTIES, THE "DUTY TO READ" DOES NOT SERVE AS AN AUTOMATIC BAR TO THE MLADINEOS' CLAIM FOR MISREPRESENTATION. THE QUESTION OF REASONABLE RELIANCE IS A MATTER TO BE CONSIDERED AND DETERMINED BY A JURY.

The Nationwide Parties in Section III(B)(1) of their Brief have continued their argument from the Trial Court that the "duty to read" serves as a automatic bar. That is simply not the case. The Mladineos have fully discussed and analyzed the Mississippi cases in their Brief, showing that the "duty to read" does not serve as an automatic bar. There is no need to rehash the discussion of those decisions. What is of primary importance is that with respect to an insurance transaction is that there must be a **reasonable opportunity to read** before an insured can be bound by coverage, in

particular, coverage that did not conform to the insured's specific request. Whether the policyholder had a reasonable opportunity to read the policy and take action is a jury question. The Nationwide Parties have thus far failed to acknowledge this aspect of "duty to read." Instead, the Nationwide Parties have supported an interpretation of the "duty to read" that binds the insured immediately upon receipt of the policy.[8]

There is no Mississippi case where the "duty to read" alone has served to bar a plaintiff's claims for misrepresentations of the agent under factual circumstances similar to the circumstances involved here. The primary cases relied on by the Nationwide Parties involved situations in which either a substantial period of time had passed (much longer than four months) between receipt of the policy and a complaint by the policyholder, or the policy was in the possession of the insured at the time the alleged misrepresentations were made, or both: *Leonard v. Nationwide Mutual Ins. Co.*, 499 F.3d 419 (5th Cir. 2007) (insureds had had contradictory written terms in their possession for **ten years** at the time the misrepresentations were made); *GuideOne Mut. Ins. Co. v. Rock*, 2009 WL 2195047 (N.D. Miss. July 22, 2009) (dealing with allegations of fraudulent misrepresentation not issues of negligence); *Oaks v. Sellers*, 953 So. 2d 1077 (Miss. 2007) (insured had owned and held the policy for **four years** and had renewed the policy at the end of the initial three-year term, without complaining of the agent's negligence; case decided on the statute of limitations not the "duty to read."); *Stephens*, 850 So. 2d 78 (alleged misrepresentation occurred when the policyholders had the policy in their possession and policyholders waited **twenty-nine years** before complaining); *Cherry*, 501 So. 2d 416 (Miss. 1987) (the Court rejected the insured's claim that they had a reasonable belief of coverage in the face of unambiguous policy terms; however, in deciding whether the chancellor

[8]Although the Nationwide Parties have not completely acknowledged that an insured must have a reasonable opportunity to read the policy upon receipt, they have acknowledged the concepts "ample time" and "fair notice."

had erred in failing to submit the claim of fraud to the jury, the Court found that there was no evidence of a misrepresentation); *Allgood v. Metro Life Ins. Co.*, 543 F. Supp. 2d 591 (S.D. Miss. 2008) (involving mere ignorance of the terms of a policy; no allegations of misrepresentation or failure to procure); *Evans v. Horace Mann Life Insurance Company,* 946 So. 2d 410 (Miss. 2006) (the claim was for misrepresentation, but it turned out that there had been no misrepresentation and the agent had correctly explained the terms of the policy). The Court will see from a reading of these cases, that they are distinguishable from the case at bar.

In Section III(B)(2) of their Brief, the Nationwide Parties, relying primarily on *Leonard,* argue that the Mladineos' reliance on Schmidt's misrepresentations was unreasonable as a matter of law. This analysis completely ignores the opinions of this Court in *American Income Life Ins. Co. v. Hollins*, 830 So. 2d 1235 (Miss. 2002) and *United Insurance Co. v. Merrill*, 978 So. 2d 613 (Miss. 2007), more fully discussed subsequently in Point IV of this Brief. These cases stand for the proposition that insurance companies can be bound by the statements of their agents acting within the scope and course of their apparent authority, irrespective of the actual terms of a policy. The Nationwide Parties also refuse to consider Schmidt's misrepresentations in light of the broader context of the facts relating to his failure to procure specific coverage as requested by the Mladineos. These considerations make the question of "reasonable reliance" one for the trier of fact. Finally, the analysis of the Nationwide Parties fails to take into account the long line of authority requiring that an insured be afforded at least a reasonable opportunity to examine his policy or policies.

The other cases cited by the Nationwide Parties in this section are also clearly distinguishable, as discussed earlier in this Section III. Nationwide also cited *GuideOne Mut. Ins. Co. v. Rock,* which deals with the insured's counterclaim for allegations of fraudulent

misrepresentation (not issues of negligence), which was asserted against the insurer's declaratory action to rescind and for other relief. Its precedential value is limited.

IV. *MERRILL* AND *HOLLINS* ARE INSTRUCTIVE IN THIS CASE AND RECOGNIZE THAT AN AGENT ACTING WITH APPARENT AUTHORITY CAN BIND HIS PRINCIPAL INSURANCE COMPANY.

The Nationwide Parties' argument in Section III(B)(3) of their Brief that *United Insurance Company v. Merrill*, 978 So. 2d 613 (Miss. 2007) and *American Income Life Insurance Company v. Hollins*, 830 So. 2d 1235 (Miss. 2002) are not applicable to this case is flawed. The Nationwide Parties' attempts to limit *Hollins* and *Merrill* to "post-claim underwriting cases" are unconvincing. *Hollins* undeniably recognizes that an agent acting with apparent authority can bind the insurance company with his misrepresentations and that reliance is not rendered unreasonable automatically by the "duty to read":

> We and other courts have held insurers to be bound by the actions of their agents acting within the scope of apparent authority regardless of the policy's actual terms .... The only restrictions on [the agent's] authority appeared on page 9 of the policy itself states that "[n]o agent may change this policy or waive any of its provisions." When the statement was made to Hollins [that she was covered for the illness in questions] she was . . . not provided with notification of the pre-existing condition exclusion which controverted the [agent's] statement. Hollins did not receive the policy until [after the date of the application and misrepresentations] and the application did not contain the exclusion. **Therefore, Hollins had already relied on the agents' statement before receiving the policy. . . . That she did not read [the policy] does not alter the fact that she relied on [the agent's] statement before the policy was provided to her. The exclusion contained in the policy, while unambiguous, was not made available to her until after she had purchased the insurance in reliance on [the agent's] statement. Because Hollins was not informed otherwise prior to her relying on [the agent's] statement, reliance on the statement that her condition would be covered was reasonable.**
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> There is a vast difference between stating that one is bound by contract terms and stating that one possess knowledge of the contract terms. "Bound by the terms" of a contract requires not only knowledge of the terms, but also a determination that, on the particular facts at bar, the terms are legally binding on the parties. **That one who receives an insurance contract but does not read it is automatically bound by its terms as a matter of law is not a correct statement of the law.**

830 So. 2d at 1237-1244 (emphasis added). Likewise, *Merrill* recognizes and reaffirms those same principles:

> Furthermore, according to the law of this state, the policy language cannot limit the responsibility of United. "We and other courts have held insurers to be bound by the actions of their agents acting within the course and scope of their, apparent authority, *regardless of the policy's actual terms. American Income Life Ins., Co. v. Hollins*, 830 So. 2d 1230, 1237 (Miss. 2002).

978 So. 2d at 629 (emphasis in original).

The Nationwide Parties claim that *Hollins* is distinguishable from the present case and cite *Pongetti v. First Continental Life & Accident Co.*, 688 F. Supp. 245 (N.D. Miss. 1988) in support of their contention. The problem with the Nationwide Parties' reliance on *Pongetti* is that the court in *Pongetti* found that the plaintiffs had "not satisfied" the detriment element of apparent authority." *Pongetti*, 688 F. Supp. at 249. Here, as in *Hollins*, the Mladineos can satisfy the "detriment" element of apparent authority. Relying on the statements of Schmidt, the Mladineos purchased a policy that did not provide the coverage sought, leaving them under-insured against the perils for which they specifically requested coverage. Moreover, *Pongetti* turned on questions of waiver and estoppel and this case does not.

The Nationwide Parties also attempt to use *Fidelity and Guaranty Life Ins. Co. v. Williams,* 2008 WL 336605 (S.D. Miss. Feb. 1, 2008) to limit *Hollins* and *Merrilll.* Such an argument is without merit because the *Williams* court specifically noted that the application for insurance involved, which was in the possession of the insured at the time the misrepresentations were made, specifically provided that the agent did not have the authority to modify the insurance policy. In this case, Nationwide provided no such notice of the limitation on Schmidt's authority to the Mladineos. In fact, Schmidt never asked the Mladineos to sign an application. Even if an application had been signed, the document would not have contained notice of what they now claim are limitations on

Schmidt's authority. Furthermore, the *Williams* court noted that a similar notice on the limitation of the agent's authority had been given in *Leonard.* The notices in *Leonard* referred to by the *Williams* court were probably the ten years of renewal notices involved in that case, together with the plaintiffs' possession of the policy for **ten years**.

The Nationwide Parties again cite *Leonard,* and although this case has been discussed extensively enough, it should be pointed out again that the facts of *Leonard* are clearly distinguishable from the present case. 499 F. 3d 419 (5th Cir. 2007). In *Leonard,* the alleged misrepresentations, if any, took place ten years before the complaint was filed. The other allegations against the agent took place after the policy in question had been renewed annually over a ten-year period. Also, the plaintiffs had received renewal notices for ten years clearly pointing out exclusions from coverage. In other words, the plaintiffs had had ten years to review not only their annual policies, but the notices of renewal over that same period. In other words, even if an affirmative misrepresentation had been made by the agent after years of renewals, the misrepresentations were made under such circumstances that plaintiffs had notice of the actual terms of the policy at the time such representations were made. The *Leonard* opinion is not controlling as to the facts in the Mladineos' case. Also, it is clear that the *Leonard* court ignored this Court's opinion in *Hollins.* The issuance by this Court of its *Merrill* opinion has made that much more difficult to do. As the *Williams* court impliedly noted, after *Merrill, Leonard* may have been limited in its effect.

Despite the Nationwide Parties' refusal to admit it, *Hollins, Merrill, Williams*, and even *Leonard* recognize that an agent acting with apparent authority can bind his principal insurance company by his misrepresentations. Nevertheless, even if Schmidt did not bind Nationwide through his apparent authority, Schmidt would still be liable individually for his negligent misrepresentations, a point the Nationwide Parties ignore completely.

V. THE NATIONWIDE PARTIES DID, IN FACT, WAIVE THE "DUTY TO READ" DEFENSE.

In an apparent effort to discredit the Mladineos, the Nationwide Parties dismiss the Mladineos' waiver assertion as a "throw it against the wall and see if it sticks argument." Appellees' Brief, p. 37. The Nationwide Parties' approach of attempting to degrade the waiver argument is not surprising, given that they have not been able to come up with a good reason why they did not raise the "duty to read" affirmative defense when they should have or any persuasive authority for why their failure to raise the affirmative defense should not constitute a waiver thereof. That they saw fit to spend a full four pages of their Brief arguing against it reveals a more authentic attitude towards the issue by the Nationwide Parties: that not only is the waiver issue a legitimate argument, but also that it has much credence.

The best the Nationwide Parties could come up with in response to the waiver issue was that the "duty to read" is "not an affirmative defense" but a "settled principle of Mississippi law." Appellees' Brief, p. 38. With this empty argument, the Nationwide Parties seem to be implying that affirmative defenses are not settled principles of Mississippi law. It is not altogether clear what the Nationwide Parties are trying to say with this argument, but to the extent that they are suggesting that there is a difference between substantive law and procedural law and that issues of substantive law cannot be affirmative defenses, clearly this suggestion is inaccurate. A simple review of Rule 8 of the Mississippi Rules of Civil Procedure shows as much. Listed in Rule 8 are, among others, "contributory negligence," "duress," "estoppel" and "fraud." Miss. R. Civ. P. 8. Obviously, contributory negligence, duress, estoppel and fraud (along with other affirmative defenses) are examples of affirmative defenses that are principles of settled principals of substantive Mississippi law. Thus, the argument that the "duty to read" is not an affirmative defense because it is an "settled principle of Mississippi law" is unpersuasive.

Next, the Nationwide Parties' points that the "duty to read" is not an affirmative defense are that "[i]t is not listed as an affirmative defense in Mississippi Rule of Civil Procedure 8, nor is it a matter of avoidance." Appellee's Brief, p. 38. First, the Nationwide Parties' statement that the "duty to read" is not an affirmative defense, because it is not listed in Rule 8 is baseless. Even in the comment to Rule 8, it is stated that "[t]he list of affirmative defenses in Rule 8(c) is not intended to be exhaustive." Miss. R. Civ. P. 8, cmt. Second, the Nationwide Parties' assertion that the "duty to read" defense is not a matter of avoidance is simply wrong. A defense is characterized as an avoidance or an affirmative defense if by asserting the defense, the defendant would prevail even if the plaintiff proves everything he alleges and asserts. *Hertz Commercial Leasing Division v. Morrison*, 567 So. 2d 832, 835 (Miss. 1990). This very assertion, that the Nationwide Parties should prevail even if the Mladineos prove everything they allege and assert, is the essence of the Nationwide Parties' "duty to read" argument.

Moreover, the Nationwide Parties' justification that the defense was not waived because "more than a month in advance of the agreed-upon October 24, 2008 deadline for filing dispositive motions" is unfounded. Appellees' Brief, p. 40. This argument suggests that a scheduling order somehow trumps considerations of the waiver of affirmative defenses, obligations under the Mississippi Rules of Civil Procedure, a position for which there is absolutely no authority. Regardless, the Nationwide Parties' motion though titled a "Motion for Summary Judgement" was actually a motion for judgment on the pleadings or a Rule 12(b) motion to dismiss for failure to state a claim, since the position taken by the Nationwide Parties is that the Mladineos' Complaint contained a "defect" in that it plead a claim, the elements of which the Mladineos could not prove by reason of the "duty to read" defense. Appellees' Brief, p. 38. Again, the only information on which the Nationwide Parties' version of the "duty to read" defense is based was contained in the

Complaint, a fact that the Nationwide Parties admit, even in this section of their Brief. *See* Appellees' Brief, p. 38.

Furthermore, the Nationwide Parties argue that discovery on "necessary issues" had to be completed before they could raise the "duty to read" defense. This argument amounts to the Nationwide Parties trying to "have their cake and eat it too." On the one hand, they assert that the "duty to read" defense is applicable regardless of the time the Mladineos had their policy – that the terms were imputed to them immediately upon delivery – and that other circumstances surrounding the transaction are irrelevant. On the other hand, in their argument that the "duty to read" is not an affirmative defense, they argue that certain facts (such as whether the Mladineos read their policy) were necessary for the defense. Well, which is it? Are there issues of material fact that are relevant to the applicability of the "duty to read" defense, or are there not. The Nationwide Parties simply espouse whichever view is convenient for their argument at the time, an approach that is reprehensible. Insofar as the Nationwide Parties are suggesting here that there are issues of material fact relevant to the "duty to read" analysis, the Mladineos agree that there are issues of material fact. In that regard and to the extent that the "duty to read" operates as a contributory negligence defense, as the Mladineos have suggested all along, then the "duty to read" is not an affirmative defense and has not been waived. However, to the extent that the "duty to read" operates as a complete bar as the Nationwide Parties suggest, the "duty to read" is an affirmative defense and has most definitely been waived.

Under the Nationwide Parties' theory that they have set forth the majority of the time, the applicability of the "duty to read" defense depends on the presence of two facts: (1) that the Mladineos purchased an insurance policy; and (2) that a copy of the policy was delivered. In their original Complaint filed on September 29, 2006, the Mladineos admitted that they purchased a policy

and that they received a copy of it. Despite having knowledge of the facts required for their defense immediately upon receipt of the Complaint, the Nationwide Parties waited nearly two years, having come within two months of an earlier trial date and not bringing the argument forward, and only raising the defense within three months of the scheduled trial date, all the while actively participating in this litigation. Pursuant to *MS Credit Ctr., Inc. v. Horton*, 926 So. 2d 167, 180 (Miss. 2006) this "substantial and unreasonable delay," coupled with active participation in litigation, has resulted in the Nationwide Parties' waiver of the "duty to read" defense.

VI. THE MLADINEOS' CLAIMS AGAINST NATIONWIDE FOR BREACH OF CONTRACT AND BREACH OF THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING ARE VIABLE.

The Nationwide Parties argue in Section III(B)(5) of their Brief that there has been no breach of contract or breach of the implied duty fo good faith and fair dealing. The crux of the Nationwide Parties' argument is that "[s]ince the Mladineos cannot prevail on their misrepresentation/negligence/failure to procure claims, they cannot prevail on their claim for breach of contract." Appellees' Brief, p. 25. The problem with this argument, and what the Nationwide Parties fail to recognize is that if the Mladineos can prevail on their claims against Schmidt, then they can prevail on their claims of breach of contract claims against Nationwide. The rest of the section is nothing more than a reiteration of the flawed arguments set forth previously by the Nationwide Parties regarding whether the Mladineos can succeed on their claims regarding the agent's misconduct. As has been addressed already, the Mladineos' claims against Schmidt for his misconduct are viable. Therefore, their claims against Nationwide for breach of contract and breach of the implied duty of good faith and fair dealing are viable.

VII. THE MLADINEOS' CLAIMS ARE VIABLE AGAINST NATIONWIDE FOR ITS INADEQUATE INVESTIGATION OF THEIR CLAIM AGAINST THE AGENT.

Section III(E) of the Nationwide Parties' Brief attempts to discredit the Mladineos' claims against Nationwide for the Agent Support Group's handling and "investigation" of the Mladineos' claim against the agent. The Mladineos' original Brief provides a thorough and detailed discussion of this claim, the essence of which is that Nationwide failed to conduct a fair, prompt and adequate investigation of the Mladineos' claims. The Mladineos should have been afforded their right to present to the jury the material facts underlying those claims.

The Nationwide Parties claim that Nationwide "had no duty to investigate the incident report al all." Appellees' Brief, p. 42. The Nationwide Parties claim that no such duty existed, because Nationwide was not Schmidt's errors and omissions carrier. However, Nationwide voluntarily decided to perform an "investigation." The Nationwide Parties claim that even if it were Schmidt's errors and omissions carrier, the Mladineos could not maintain a claim against Nationwide, because Mississippi law does not permit a direct "action against an alleged tortfeasor's liability insurer." Appellees' Brief, p. 43. The problem with this assertion is that this is not a direct action against a third-party liability carrier. This is an action by a policyholder against its insuror, an insuror who has an obvious conflict of interest in dealing with its agent and its insured regarding the claim of agent error. Surely, the Nationwide Parties are not suggesting that Nationwide owed no duty to fairly investigate the Mladineos' claim. Mississippi law is clear on that issue. *Bankers Life & Cas. Co. v. Crenshaw*, 483 So. 2d 254, 276 (Miss. 2005) ("[A]n insurance company has a duty . . . to make a reasonably prompt investigation of all relevant facts" and to conduct an "**adequate investigation and [to make] a realistic evaluation of the claim.**") (emphasis added). In fact, a true third-party liability carrier, Fireman's Fund Insurance Company, paid a related errors and omissions claim

arising out of the same facts. Would they have paid if there was no probability of agent error? Nationwide failed to meet its duty by failing to adequately investigate the Mladineos' claims against, and by ignoring the gross misconduct of, its agent. Nationwide's failure to comply with that duty in its dealings with the Mladineos is compensable.

VIII. JUSTICE, PUBLIC POLICY AND COMMON SENSE REQUIRE THAT THIS COURT REJECT THE NATIONWIDE PARTIES' POSITION AND ALLOW A JURY TO CONSIDER THE ISSUES OF MATERIAL FACT PRESENT IN THIS CASE.

As noted in Appellant's original Brief, Article 3, Section 24 of the Mississippi Constitution of 1890 requires that the law assure recovery for every wrong done by one to another. A general analysis of both the facts of this case and the law relevant to those facts leads to the conclusion that this Court cannot accept the Nationwide Parties' position while upholding that most basic of legal assurances. For to do so, in accepting the Nationwide Parties' position, would result in an injustice.

If this Court were to accept the Nationwide Parties' interpretation of the law, then insurance companies and their agents could market, sell and induce consumers to purchase policies through any manner of misrepresentations or misconduct, and be totally absolved by simply delivering a policy to the unsuspecting consumer, one that contained whatever coverage an insurance company wanted, or for that matter, no coverage at all, affording the consumer no opportunity at all to review the coverage procured by the agent and provided by the insurance company. Legal analysis is not necessary to decide that such a result is unconscionable; common sense tells us that.

The Nationwide Parties have asserted that "[a]ny person could knowingly under insure 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." Appellees' Brief, p. 46. The Nationwide Parties argue that an avenue for the legal

redress of wrongs should be denied to all because of possible abuse by a few. The problem with the Nationwide Parties' public policy position is that it ignores the essential function of a jury in our judicial system. The Nationwide Parties have stated a public policy position that completely favors insurance companies and their agents, leaving the consumers without any possibility of recovery against an agent's misconduct in dealings with his clients. The Mladineos are not supporting a reading of the law that is completely in favor of policyholders. The Mladineos are simply setting forth the proposition that an insurance company, its agents and the policyholder should **all** be on **equal** footing. That is, a jury should determine whose story is more credible and who is at fault. While the Nationwide Parties obviously have no faith in our jury system, the Mladineos are certain that this Court does.

CONCLUSION

For all the reasons set forth in this Appellants Rebuttal Brief and in Appellants' Original Brief, the Order for Summary Judgment entered by the Trial Court should be reversed and the case remanded for trial.

This the 8th day of February, 2010.

Respectfully submitted,

JOHN P. MLADINEO AND SHERRY MLADINEO

BY: _____
CHARLES R. WILBANKS, JR. (MS Ba[redacted]

CERTIFICATE OF SERVICE

I, CHARLES R. WILBANKS, JR., do hereby certify that I have this date caused to be served via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing to the following:

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This the 8th day of February, 2010.

CHARLES R. WILBANKS, JR.

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