IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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

NO. 2008-CA-02011

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

BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

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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. CHARLES R. WILBANKS, JR. (MS Ba[redacted]THEW R. DOWD (MS Bar [redacted]ANK T. MOORE, JR. (MS Bar [redacted]ELLS, MOORE, SIMMONS & HUBBARD, PLLC, Highland Bluff North, 4450 Old Canton Road, Suite 200 (39211), Post Office Box 1970, Jackson, Mississippi 39215-1970; Attorneys for Appellants

4. RICHARD EARL SCHMIDT; Defendant/Appellee

5. MICHAEL FELSHER INSURANCE AGENCY; Defendant/Appellee

6. NATIONWIDE PROPERTY & CASUALTY INSURANCE COMPANY; Defendant/Appellee

7. H. MITCHELL COWAN (MS [redacted] and LAURA L. HILL (MS Bar [redacted] WATKINS, LUDLAM, WINTER & STENNIS, P.A., 633 North State Street, P.O. Box 427, Jackson, Mississippi 39202; Attorneys for Appellees

8. KENNETH S. CLARK; KIRKLAND & ELLIS LLP, 655 15th Street, Suite 1200, Washington, D.C., 2005; Of Counsel for Appellees

CHARLES R. WILBANKS, JR.

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STATEMENT OF ISSUES

The Mladineos seek reversal of the Order Granting Motion for Summary Judgment of the Trial Court entered on November 7, 2008, for the reasons stated in their Brief and do hereby state the following as to be issues on appeal:

1. Whether the Mladineos are entitled to present evidence of Schmidt's negligent failure to procure, Schmidt's negligent misrepresentations and other claims and to have those issues and the issues of comparative fault and causation determined by a jury.

2. Whether the Mladineos' claims for the numerous negligent acts of the agent, including his failure to procure the coverage specifically requested and his negligent and erroneous misrepresentation of the terms of the policy are automatically barred by the "duty to read" defense.

3. Whether Nationwide had a duty to conduct a fair, prompt and adequate investigation of the claims of agent error after Nationwide, in spite of a readily apparent conflict between the interests of its policyholders and its agents, voluntarily undertook to investigate the claims of agent error and whether Nationwide's failure to meet those standards is actionable in tort.

4. Whether the Nationwide Parties waived the "duty to read" defense by (a) not including it in their denial letters to the Mladineos prior to litigation; (b) failing to plead it as an affirmative defense in any responsive pleading filed in this case prior to filing the motion for summary judgment; and (c) actively participating in this litigation for over two years before raising it for the first time in the motion for summary judgment.

5. Whether the "duty to read" defense automatically bars a claim against an insurance company for the misrepresentations of its agent acting with apparent authority.

6. Whether considerations of public policy prohibit the application and interpretation of the "duty to read" defense as interpreted by the Trial Court and whether an insured must, automatically, upon receipt of the policy, bear any and all losses arising out of and related to an agent's negligence, failure to procure and misrepresentation of the terms of an insurance policy.

STATEMENT OF THE CASE

I. Parties and Nature of the Case

The Appellants here are John and Sherry Mladineo. They are referred to collectively as "the Mladineos," and individually as "John" and "Sherry."

Appellees are Nationwide Property & Casualty Insurance Company ("Nationwide"), Michael Felsher, d/b/a The Felsher Agency ("Felsher"), and Richard Earl Schmidt ("Schmidt"). Schmidt is an employee of Felsher. Both Schmidt and Felsher are agents for Nationwide. The three are sometimes collectively referred to as "the Nationwide Parties."

This is an appeal from a summary judgment of the Jackson County, Mississippi Circuit Court dismissing all the Mladineos' claims against the Nationwide Parties for damages arising out of multiple acts of negligence and other wrongful acts committed by the Nationwide Parties. The Nationwide Parties committed negligence and wrongful acts prior to Hurricane Katrina, during the process of procuring specifically requested insurance coverage, and, subsequently, after Hurricane Katrina, in concealing and obscuring Schmidt's negligence by conducting a legally inadequate "investigation" of Schmidt's errors and omissions, and then continuing to deny payment of those claims.

The Mladineos seek reversal of the summary judgment and a remand of the case for trial on multiple questions of material fact which should rightly be determined by a jury.

II. Course of Proceedings and Disposition in the Court Below

The Mladineos initiated suit in this case on September 9, 2006, in the Circuit Court of Jackson County, Mississippi. R. vol. 1, 18-66. The Mladineos propounded their initial discovery requests to the Nationwide Parties at the same time. R. vol. 1, 67-72. On November 17, 2006, in

lieu of an Answer, the Nationwide Parties removed this case to the United States District Court for the Southern District of Mississippi. R. V. 1 at 73-136. On December 1, 2006, the Nationwide Parties filed their Answer to the Mladineos' Compliant. R. V. 18 at 2606-17. It should be noted that the Answer of the Nationwide Parties did not include the "duty to read" as an affirmative defense. This case was remanded to the Circuit Court of Jackson County, Mississippi on May 16, 2007. R. V. 1 at 140-44.

The parties then engaged in a period of active and extensive discovery. The Trial Court conducted a scheduling conference by telephone, and on November 14, 2007, entered an Agreed Scheduling Order setting discovery deadlines and trial preparation deadlines. The Agreed Scheduling Order set the trial of the cause to begin on June 16, 2008. R. V. 2 at 196-97.

In February, 2008, the Mladineos filed an Amended Complaint to include one or more additional causes of action based on facts learned during discovery. R. V. 2 at 260-76. Because they planned to file a Second Amended Complaint to correct scrivner's errors, the Mladineos waived the necessity of an Answer to the first amended Complaint. Shortly thereafter, on February 18, 2008, the Mladineos filed and served their Second Amended Complaint. R. V. 2 at 281-V. 3 at 301. On February 20, 2008, the Nationwide Parties served their Answer to the Second Amended Complaint. R. V. 3 at 302-18. Once again, the Nationwide Parties did not plead the "duty to read" as one of their many affirmative defenses. R. V. 3 at 302-18.

Discovery continued, but given the scheduling conflicts of counsel and witnesses, it became apparent that discovery could not be completed by the deadlines established by the Agreed Scheduling Order. The Trial Court, on May 8, 2008, six weeks prior to the scheduled trial date, entered an order setting a new trial date, and also set new deadlines for discovery and trial

preparation. R. V. 3 at 396-97. The trial was scheduled to begin on December 8, 2008. R. V. 3 at 396-97. The parties continued to engage in discovery, including several site inspections, designations of experts, and scheduling and taking depositions of expert and lay witnesses, all in anticipation of the upcoming trial scheduled for December 8, 2008.

On September 17, 2008, more than two years after the initial Complaint was filed, and less than three months prior to trial, the Nationwide Parties filed their Motion for Summary Judgment. R. V. 6 at 827-V. 7 at 957. This was the first time the Nationwide Parties asserted the "duty to read" defense. R. V. 6 at 827-V. 7 at 957. The Nationwide Parties' Motion for Summary Judgment sought dismissal of **all** claims on the grounds that Nationwide had issued a policy of insurance to the Mladineos (although it did not conform to what they had asked the agent to procure) and that the Mladineos had received a copy of the insurance policy in the mail. R. V. 6 at 827-V. 7 at 957. On September 22, 2008, the Nationwide Parties filed a Verified Petition to Transfer Venue seeking to have the case heard in a venue other than the Circuit Court of Jackson County, Mississippi. R. V. 7 at 1012-V. 13 at 1820. The Mladineos filed their own Motion for Partial Summary Judgment seeking an order from the Trial Court that the "duty to read" affirmative defense, having not been plead or otherwise timely brought to the attention of the Trial Court by the Nationwide Parties, had been waived. R. V. 15 at 2238-V. 17 at 2455.

The Trial Court heard argument on all three motions on October 10, 2008. The Motion For Change of Venue was denied. Hrg. Transcr. 74:4-11 (Oct. 10, 2008); R. V. 17 at 2467. The Trial Court took the two summary judgment motions under advisement. Hrg. Transcr. 74:2-4 (Oct. 10, 2008).

III. The Judgment

On November 7, 2008, the Trial Court entered its Order Granting [the Nationwide Parties'] Motion for Summary Judgment (the "Judgment"). R. V. 17 at 2468-72. The Judgment was prepared by attorneys for the Nationwide Parties, and the Trial Court adopted the Judgment in its entirety. The Trial Court also denied the Mladineos' Motion for Partial Summary Judgment as to the waiver issue. R. V. 17 at 2468-72.

The Trial Court dismissed **all** claims of the Mladineos, whether those claims sounded in tort or in contract, holding that the "duty to read" defense required dismissal without any consideration or evaluation of the facts other than whether the policy was issued and ultimately received. R. V. 17 at 2468-72.

The various aspects, provisions and errors of the Judgment will be developed in the Statement of Facts and Argument portions of this brief. It is this Judgment which the Mladineos now appeal and of which they seek reversal. R. V. 17 at 2468-72.

IV. Statement of the Facts

(A) Discussions Between John and Schmidt Regarding Insurance Coverage Specifically Requested and the Insurance Policy Recommended by Schmidt

Beginning about three weeks prior to March 10, 2005, John, who had never lived on the Gulf Coast, acting for himself and on behalf of his wife, Sherry, engaged in multiple telephonic discussions with Schmidt regarding the need for insurance coverage on the house the Mladineos planned to purchase in Ocean Springs, Mississippi located on the backwaters of Biloxi Bay (the "Ocean Springs home"). Depo. John Mladineo 37:1-17 (Mar. 4, 2008). During John's initial

conversation with Schmidt, Schmidt indicated that he was familiar with the property. Depo. John Mladineo 44:23-45:23 (Mar. 4, 2008); Depo. Richard Schmidt 45:12-46:2 (Jan. 11, 2008).

After further discussions regarding details of insurance coverage, including coverage for other structures, policy limits, deductible amounts, and after Schmidt's inspection of the premises, John, relying on the information from, the advice offered by, and the recommendations made by Schmidt, purchased the insurance policy recommended by Schmidt. Depo. John Mladineo 44:23-45:23 (Mar. 4, 2008). As regards these discussions, it should be noted that Schmidt commented that "John asked a lot of questions" and that he, Schmidt, felt John was relying on his answers to make a decision in purchasing insurance coverage. Depo. Richard Schmidt 69:20-71:3 (Jan. 11, 2008). Schmidt's impression was that John was more inquisitive than most of his customers about the procurement of insurance protection, particularly from damage relating to a hurricane. Depo. Richard Schmidt 70:12-16 (Jan. 11, 2008).

There is, however, conflicting testimony as to the specific details of the discussions between John and Schmidt, which presents genuine issues of material facts to be determined by a jury. John, in his deposition testimony, stated that he told Schmidt he wanted a homeowners policy but was particularly interested in getting insurance coverage for **all** damage from wind and water from all storms. Depo. John Mladineo 51:5-16 (Mar. 4, 2008). John characterized his request for insurance coverage as "an inclusive request for a homeowners policy as well as specific coverage for wind and water damage from any storm." Depo. John Mladineo 49:17-19 (Mar. 4, 2008). Asked again about his initial statements to Schmidt regarding insurance coverage, John further testified, "I told him we were buying a house. We needed an insurance policy for the house, but we [also] wanted to make sure that we had coverage from all wind and water damages from all storms." Depo. John Mladineo

50:11-15 (Mar. 4, 2008). According to John, Schmidt's response was, "you need a hurricane policy." Depo. John Mladineo 51:10-11 (Mar. 4, 2008). Schmidt further indicated that a regular homeowners policy would not cover damage from a named storm. Depo. John Mladineo 51:11-13 (Mar. 4, 2008). John then asked whether the hurricane policy would pay for **all** wind and water damages, to which Schmidt replied, "yes it would." Depo. John Mladineo 51:13-14 (Mar. 4, 2008). Schmidt then added that "since you don't live in a flood plain the bank won't require a separate flood insurance policy." Depo. John Mladineo 51:15-17 (Mar. 4, 2008). John further testified that since Schmidt had indicated that with the hurricane policy he was covered for all wind and water damage from all storms, then, with this assurance, John made no further inquiries regarding coverage for either wind or water damages. Depo. John Mladineo 51:5-52:7 (Mar. 4, 2008). John kept notes of his conversations with Schmidt.

Schmidt's deposition testimony about his conversations with John was less certain than John's. Schmidt had little, if any, definitive recollection about those conversations: "I remember speaking to him, but I can't tell you the content [of those conversations]." Depo. Richard Schmidt 66:18-25 (Jan. 11, 2008). In addition, Schmidt testified that he did not remember "a whole lot right now" and that "a lot of this is going to be speculation because this is what we do every single day." Depo. Richard Schmidt 35:4-6, 35:22-23, 36:20-25 (Jan. 11, 2008). Schmidt testified that "we discussed flood exclusions" and gave as his reason, "we discussed flood insurance in depth, or we discussed hurricanes in depth." Depo. Richard Schmidt 57:15-17 (Jan. 11, 2008). Schmidt's "reason" is totally incomprehensible and meaningless, particularly in light of Schmidt's admission that prior to Hurricane Katrina, they did not routinely offer flood policies and that he did not offer a flood policy to John. R. V. 14 at 2100.

In addition to misrepresenting the terms of the policy that Schmidt recommended to the Mladineos, as earlier discussed, Schmidt failed to follow agency 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). Schmidt's failure to follow these practices constitutes negligence and contributed to his ultimate failure to procure the specifically requested insurance coverage. R. V. 15 at 2111-35. Schmidt failed to fully understand and explain the terms of the policy coverage and the exclusions. Schmidt did not perform a complete inspection of the property and failed to inform the Mladineos that a portion of their property was in a flood zone. R. V. 15 at 2101; Depo. Richard Schmidt 75:23-76:5 (Jan. 11, 2008). Schmidt failed to recommend or offer a flood policy to the Mladineos. R. V. 14 2100; Depo. Richard Schmidt 84:8-85:4 (Jan. 11, 2008). Schmidt failed to obtain a signed application and failed to maintain a complete file, including accurate notes, regarding his business dealings with the Mladineos. Depo. Richard Schmidt 33:15-35:6 (Jan. 11, 2008); Depo. Donna Elliott 91:16-92:20 (Mar. 25, 2008). Schmidt also failed to educate himself as to the issues

regarding the promotion and selling of flood insurance. Depo. Richard Schmidt 83:10-19, 88:14-25 (Jan. 11, 2008).

Acting upon the request of Schmidt, Nationwide issued a Homeowners Policy with a "Hurricane Coverage and Deductible Provision Endorsement" effective March 10, 2005, the date the Mladineos closed their purchase of the Ocean Springs home. Depo. John Mladineo 39:18-40:18 (Mar. 4, 2008). John paid the premium for the policy before the policy was issued or received. Depo. John Mladineo 39:18-40:18 (Mar. 4, 2008).

(B) Hurricane Katrina

On August 29, 2005, within the subject policy period, the insured dwelling, other structures (the pier and boathouse) and certain personal property were severely damaged by the winds and water associated with Hurricane Katrina. R. V. 14 at 1972. John promptly filed a claim, and an adjustor for Nationwide inspected the Ocean Springs home on October 13, 2005. Depo. John Mladineo 61:9-14 (Mar. 4, 2008). After that, Nationwide denied coverage for damages caused to the pier and boathouse because the policy excluded coverage for these structures — contrary to the representations made by Schmidt. R. V. 14 at 2026. The damage caused to the dwelling by the storm surge was "under review." R. V. 14 at 2026. The claim for damages to the dwelling caused by the waters of the storm surge was ultimately denied, even though John had requested insurance coverage for damages resulting from all wind and water from all storms, and even though Schmidt assured John that the recommended hurricane policy provided such coverage. R. V. 14 at 2027.

Preceding that ultimate denial, however, were the events described in the next two subsections.

(C) John's Discussions with Schmidt and the Submission of the Errors and Omissions Claim

After being advised that the claim for damages to the dwelling caused by the storm surge was under review and that the claim for damages to the pier and boat house had been denied, John met with Schmidt in Schmidt's office on October 26, 2005, to discuss the unexpected lack of coverage. Depo. John Mladineo 68:11-71:14 (Mar. 4, 2008). This was the first time John and Schmidt had met "face to face." Depo. John Mladineo 68:11-71:14 (Mar. 4, 2008). Schmidt appeared startled and confused and indicated that he had **no clear recollection of his conversations with John leading up to the purchase of the recommended insurance policy**. Depo. John Mladineo 68:11-71:14 (Mar. 4, 2008). Schmidt did exclaim at that time, "**[w]e didn't get flood insurance?**" Depo. John Mladineo 68:11-71:14 (Mar. 4, 2008). Schmidt then indicated that he should and would file an errors and omissions claim, and completed the errors and omissions claim form (the "E & O Claim Form") in John's presence. Depo. John Mladineo 68:11-71:14 (Mar. 4, 2008). At John's request, Schmidt allowed John to read the E & O Claim Form as completed, but declined John's request for a copy thereof on the grounds that Nationwide's company policy prohibited giving a copy of the E & O Claim Form to the policyholder. Depo. John Mladineo 68:11-71:14 (Mar. 4, 2008). (The E & O Claim Form's proper title was *Agents Professional Liability Incident Report*. R. V. 14 at 2029.)

The completed E & O Claim Form was forwarded by Schmidt to Nationwide. Depo. Richard Schmidt 99:14-100:13 (Jan. 11, 2008). On the E & O Claim Form, Schmidt indicated that the Mladineos' claim made against him related to an insurance policy written by Nationwide, thereby designating the errors and omissions claim as one to be handled by Nationwide's in-house Agent Support Claims Program, also referred to as the Agent Support Group ("ASG"). R. V. 14 at 2029.

The E & O Claim Form on its face indicated that if the Mladineos' errors and omissions claim against Schmidt had related to a policy written by an insuror other than Nationwide, then the professional liability claim would be assigned to and handled by Fireman's Fund Insurance Company ("Fireman's Fund"), an independent errors and omissions carrier. R. V. 14 at 2029. Nationwide did, in fact, refer the other portion of the Mladineos' errors and omissions claim relating to the "other structures" – that is, the pier and boathouse – to Fireman's Fund, and that claim was resolved to the Mladineos' satisfaction by Firemen's Fund. R. V. 14 at 2030-32.

(D) "Investigation" of the Errors and Omissions Claim by Nationwide's Agents Support Group

The E & O Claim Form as ultimately sent by Schmidt to Nationwide contained the following language, which represents Schmidt's version of the facts:

> Policyholder was told that house was covered for hurricanes
> But there was no coverage for storm surge
> Also, policyholder was not told about exclusions for piers and boathouses.

R. V. 4 at 2029 (Capitalization and punctuation those of Schmidt).

John's recollection of the E & O Claim Form as he read it immediately after Schmidt's completion thereof, differs from the E & O Claim Form as submitted to Nationwide: line two had formerly been "but not told no coverage for storm surge." Depo. John Mladineo 216:7-217:9 (Mar. 4, 2008). John's recollection of the original language of the E & O Claim Form is consistent with the overall tenor of John's discussions with Schmidt during the October 26, 2005 meeting regarding the unexpected lack of coverage. Depo. John Mladineo 216:7-217:9 (Mar. 4, 2008).

As earlier noted, the E & O Claim Form was referred to, received by, and handled by Agent Support Group ("ASG"). R. V. 14 at 2033; Depo. Michael Felsher 59:12-60:16 (Jan. 11, 2008).

Nationwide's representatives described ASG as providing certain errors and omissions benefits to Nationwide's agents for professional liability claims arising out of or related to the sale of insurance products written by Nationwide. Depo. Cynthia Wegner 14:8-15:22 (Mar. 25, 2008); Depo. Donna Elliott 62:10-63:3 (Mar. 25, 2008); Depo. John English 13:6-14, 15:4-18:25 (Mar. 26, 2008). Two of the same representatives testified also that the purpose of ASG **is to provide help and assistance to the agents of Nationwide when they are involved in errors and omissions disputes with Nationwide's own policyholders.** Depo. Cynthia Wegner 14:8-15:22 (Mar. 25, 2008); Depo. Donna Elliott 62:10-63:3 (Mar. 25, 2008). It should be noted, too, that at the outset of this "investigation" on October 27, 2005, the day following the filing of the errors and omissions claim, Nationwide's stated that its purpose was to "strive to support" its agents. R. V. 14 at 2033.

The errors and omissions claim was assigned to Donna Elliott, Claims Associate. R. V. 14 at 2033. At no time material to this litigation did Nationwide provide ASG with any standards or guidelines by which to measure an agent's conduct in selling insurance products, even though such guidelines, according to the testimony of Nationwide's personnel, were probably in existence. Depo. Donna Elliott 22:23-23:11, 27:5-28:9, 29:16-24, 111:18-113:12, 129:13-25 (Mar. 25, 2008). Neither did ASG have any such guidelines or standards from any other source. Depo. Donna Elliott 22:23-23:11, 27:5-28:9, 29:16-24, 111:18-113:12, 129:13-25 (Mar. 25, 2008). The public policy considerations regarding the promotion and selling of flood insurance were ignored and never considered during the investigation. Depo. Donna Elliott 29:16-24, 82:8-84:5, 113:4-12 (Mar. 25, 2008). No on-the-ground investigation was conducted. Depo. Donna Elliott 148:13-20 (Mar. 25, 2008). Nationwide also failed to ascertain or determine the existence of local agency standards or guidelines for agent conduct in the selling of insurance policies. Depo. Donna Elliott 22:23-23:11,

27:5-28:9, 29:16-24, 111:18-113:12, 129:13-25 (Mar. 25, 2008). The "investigation" consisted of only three telephone calls, two to the agent and one to the policyholder; a review of certain documents forwarded by John to ASG, which were his notes and other documents relating to his conversations with Schmidt regarding insurance coverage; at least one conference between Donna Elliott and her superior, Cynthia Wegner; and at least two conferences with counsel. Depo. Donna Elliott 148:13-20 (Mar. 25, 2008); R. V. 14 at 2100-V. 15 at 2101-02. No recordings were made of any of the telephone conversations between ASG and either John or Schmidt, and no sworn statements were obtained from either John or Schmidt. Depo. Donna Elliott 24:11-14, 25:7-13 (Mar. 25, 2008).

It is instructive that the first call from ASG was to the **agent** and not to the policyholder. R. V. 14 at 2100-V. 15 at 2101-02. Because of this, all entries in the ASG log reflect Schmidt's perspective, version, interpretation and framing of the facts and issues. R. V. 4 at 587-96. As previously discussed on pages 5 through 7 of this brief, the investigation reflected a sharp conflict in the facts as recalled by Schmidt and those recalled by John regarding the insurance coverage Schmidt was asked to procure. Depo. Cynthia Wegner 37:2-5 (Mar. 25, 2008); Depo. Donna Elliott 108:12-109:3 (Mar. 25, 2008).

Within eight working days after the investigation was first commenced, a decision had been reached that there was "no agent error on the flood portion of the claim" but that the pier and boathouse claim needed to be sent to Firemen's Fund. R. V. 15 at 2103-04. As testified to by Donna Elliott and Cynthia Wegner, advice from in-house counsel Kristy Farren and local Mississippi counsel broke the deadlock caused by the sharp dispute of facts between John and Schmidt. Depo. Donna Elliott 102:3-108:6, 151:4-11, 158:20-159:3 (Mar. 25, 2008); Depo. Cynthia Wegner 94:24-

98:3 (Mar. 25, 2008). That advice, as testified to, was that the policyholder had a "duty to read" the policy which defeated all their claims. Depo. Cynthia Wegner 35:10-37:16, 58:11-19, 94:24-98:3 (Mar. 25, 2008); Depo. Donna Elliott 97:2-20, 149:7-159:3 (Mar. 25, 2008). It should be noted here that, as of this time, November 12, 2005, a full reading of all Mississippi appellate cases reflects that Mississippi law **did not support** such a sweeping application of the "duty to read" defense.

Despite such testimony, no reference is made to the "duty to read" defense in ASG's denial letter to John dated November 15, 2005, advising John of the finding of "no agent error," on John's errors and omissions claim against Schmidt. The letter is reproduced in pertinent part as follows:

> I understand from my discussions with you that early this year you purchased your house in Ocean Springs which sits on a canal. You contacted Nationwide Agent Richard Schmidt **to procure homeowners coverage** for your residence. You indicated you had discussions with Agent Richard Schmidt and went over several issues with him.
>
> On [sic] point that you discussed with agent Schmidt [at the time you asked him to procure coverage] was coverage for hurricanes. You indicated that agent Schmidt assured you that you had coverage for hurricanes. You then had a loss to this residence involving the recent hurricane and was [sic] told your loss was not covered as it was a result of flooding. You did not have a flood policy. Nor were you offered one by agent Schmidt. You believe agent Schmidt incorrectly told you that you were covered for a hurricane.
>
> I have spoken with agent Schmidt. He indicates that he did personally inform you that you were covered for hurricanes, but also indicated to you that you were not covered for flood, insect damage, vermin damage, and rot.
>
> [Your] mortgagor did not require flood insurance for this [sic] premises . . .
>
> Based upon the above information, I am unable to recommend any changes to your policy. **Our investigation indicates** Mr. Schmidt exercised his due diligence . . . concerning your homeowners coverages. **Mr. Schmidt informed you that you had coverage for hurricanes, but specifically pointed out that there was no coverage for flooding** . . . Flood Insurance was not required by the lender [sic]. Agent Schmidt procured the appropriate insurance for your residence.

R. V. 15 at 2105-06 (emphasis added).

John did not learn of this decision until November 23, 2005, because ASG sent the letter to the wrong address. R. V. 15 at 2107.

Several points should be made about this letter at this juncture. First, in the second paragraph of the letter, ASG misstates the facts as related to them by John: the letter states that John contacted Schmidt and asked him to procure homeowners coverage. R. V. 15 at 2105-06. That is simply not the whole truth. John did ask Schmidt to procure homeowners coverage, but also asked that he do more–that is, to make sure that the structure was insured against damages from all water and wind from all storms. Depo. John Mladineo 49:17-19, 50:11-15, 51:5-16 (Mar. 4, 2008). Second, the "investigation" and the denial letter failed to take into account Schmidt's affirmative statement to John that the insurance policy he recommended covered damages from all water and wind from all storms (when, in fact, it did not). Depo. John Mladineo 44:23-45:23, 47:16-22, 51:3-17 (Mar. 4, 2008). Third, according to John, there were never any discussions about whether he was covered for hurricanes, per se, but all discussions related to whether he was covered for "all wind and water damage from any storms." Depo. John Mladineo 44:23-45:23, 47:16-22, 51:3-17 (Mar. 4, 2008) Fourth, the findings of "due diligence" and that "Schmidt procured the appropriate insurance for your residence" are meaningless, in light of the incomplete investigation performed, and the disregard and distortion of all the relevant facts. *See* discussion on pp. 12-13.

Even a casual reading of the facts stated in the denial letter of November 15, 2005, compels the conclusion that all conflicts of facts and law were resolved in favor of the agent and against Nationwide's policyholders. At the same time, the question is raised as to whether the outcome of the "investigation" was predetermined, and the facts distorted to justify this outcome.

(E) John's Continued Discussions with Schmidt and Nationwide's Agent Support Group

John, having been informed of Nationwide's decision, had, over the ensuing several months, multiple face-to-face and telephonic conversations with Schmidt. During these discussions between November 2005 and February 2006, Schmidt admitted to John that at the time he sold the policy to John, **he did not inform John of the flood exclusion**. Depo. John Mladineo 114:4-6 (Mar. 4, 2008). Schmidt advised John that he would promptly notify Nationwide of that fact. Depo. John Mladineo 112:20-113:25 (Mar. 4, 2008); Depo. Richard Schmidt 93:18-25 (Jan. 11, 2008). Schmidt did, in fact, so advise ASG of this admission in February 2006. Depo. John Mladineo 131:16-23 (Mar. 4, 2008); Depo. Richard Schmidt 118:3-120:12 (Jan. 11, 2008).

During this same period of time, John made multiple attempts to reach Donna Elliott at ASG regarding Schmidt's change of position and admission. Depo. John Mladineo 117:15-22 (Mar. 4, 2008). In February 2006, Donna Elliot indicated to John that in spite of Schmidt's admission to ASG, it would not alter ASG's decision of "no agent error." R. V. 15 at 2108. During these discussions, no mention of the "duty to read" was given to John as the basis of their claim denial. In June 2006, John finally was able to talk with Cynthia Wegner, Donna's supervisor, and was told by Cynthia that even if agent Schmidt had not told John of the policy exclusions, such a fact made no difference because of the "duty to read" defense. R. V. 15 at 2109-10. Thus, their decision of "no agent error" was final. R. V. 15 at 2109-10. Cynthia refused to discuss the matter further. Depo. Cynthia Wegner 35:10-37:16, 58:11-19, 94:24-98:3 (Mar. 25, 2008); Depo. Donna Elliott 97:2-20, 149:7-159:3 (Mar. 25, 2008). This was the first time that the "duty to read" defense was mentioned to John by ASG. This action was then filed with the Trial Court. The next time John heard about

a "duty to read" was not in any of the Nationwide Parties' answers, but in their Motion for Summary Judgment filed over two years after the Complaint was filed and almost three years after John received ASG's denial letter. R. V. 6 at 827-V. 7 at 957.

SUMMARY OF THE ARGUMENT

Richard Schmidt, a Mississippi licensed insurance agent for Nationwide, failed to perform basic legal duties and committed multiple acts of negligence during the process of procuring the Mladineos' insurance coverage for their newly-purchased home in Ocean Springs, Mississippi, leaving their home under-insured during Hurricane Katrina. All of these failures and errors caused, or at least significantly contributed to, the damages the Mladineos sustained by not having the complete insurance coverage they needed and had specifically requested. Nationwide denied some of the Mladineos' claims under the policy procured by Schmidt and cast doubt on the payment of other claims. The Mladineos then made a demand on Schmidt for his acts of negligence. As a result of this demand, Schmidt filed an errors and omissions claim. Nationwide handled this claim for negligence "in house," in effect providing errors and omissions coverage for their agent. The Trial Court's grant of summary judgment oversimplified the many complex legal and factual issues in the case into one issue alone: "duty to read," and, on the basis of that defense alone, granted summary judgment. Contrary to the Trial Court's ruling, there are a multitude of questions of law, as well as of material facts that must be evaluated and decided by a jury. In this *de novo* review, the evidence must be viewed in the light most favorable to the Mladineos, and the Mladineos should be given the benefit of every reasonable doubt as to the existence of issues of material fact.

Of primary importance in this appeal is the Trial Court's treatment of the Mladineos' claims against Schmidt for negligent misrepresentation and negligent failure to procure the insurance coverage the Mladineos had specifically requested. The Mladineos' claims against Schmidt for negligent misrepresentation and negligent failure to procure are not automatically barred by the "duty to read" defense. Rather, the applicable Mississippi Supreme Court opinions reflect that the defense

of "duty to read" in such actions is only relevant in a determination of comparative fault, which must be considered by a jury. It is not an issue to be resolved through summary judgment.

Likewise, the Nationwide Parties' position before the Trial Court that the Mladineos' reliance on Schmidt's misrepresentations of the terms of the policy was unreasonable *per se* is not in accord with Mississippi law. This Court's prior opinions have held that the "duty to read" defense bars a negligent misrepresentation claim only where the prospective insured had in his possession, at the time the agent's misrepresentations were made, written terms that contradicted the agent's misrepresentation, or in those instances where the insured had the policy for such an extended period of time that reliance was unreasonable as a matter of law. Neither of those factual circumstances is present here. Consequently, the reasonableness of the Mladineos' reliance on Schmidt's material misrepresentations is an issue of material fact (along with the other elements of a negligent misrepresentation claim) that must be determined by a jury.

The Mladineos' "bad faith" claim is based on Nationwide's decision to function as its agents' errors and omissions carrier in order to protect its agents if they commit errors or fail in their duties, as Schmidt did in this case. By voluntarily undertaking to provide these benefits and services to its agents, Nationwide created a conflict of interest between its duties to its policyholders, including its duty of good faith and fair dealing, and its duties as its agent's errors and omissions carrier. Nationwide had a duty to perform a complete, objective and fair investigation as to whether its agent negligently misrepresented the insurance policy he recommended and/or negligently failed to procure the insurance coverage specifically requested by the Mladineos. Nationwide failed to conduct a complete, objective and fair investigation into whether its agent negligently misrepresented the insurance policy he recommended and whether the agent negligently failed to procure the specific

insurance coverage requested by the Mladineos. The "investigation," in fact, was no more than a sham and a charade, and completely legally inadequate.

The Nationwide Parties have waived their right to assert the "duty to read" defense. The "duty to read" affirmative defense was known by and available to the Nationwide Parties at the moment this litigation was commenced and even before. However, this defense was not included at all in any of the answers or other pleadings filed by the Nationwide Parties. Moreover, the Nationwide Parties inexplicably and unreasonably chose to participate in this litigation for more than two years and waited until less than three months before trial before bringing this affirmative defense before the Trial Court. The entire argument pursued in the Nationwide Parties' Motion for Summary Judgment in the Trial Court has been waived, and this Court should reverse the Trial Court's decision on those grounds alone.

Even if this Court rules that the Nationwide Parties did not waive their affirmative defense, there are factual issues related to the "duty to read" defense, as it applies to the Mladineos contract claims, that must be evaluated by a jury. The Trial Court, as persuaded by the Nationwide Parties, granted summary judgment on the Mladineos' contract claims based on a broad and sweeping application of the "duty to read" defense, while ignoring the true nature of the Mladineos' claims in that regard. Mississippi law recognizes that an agent acting with apparent authority can, through his representations as to the terms of a policy, contractually bind its principal insurance company. There is no authority that the "duty to read" serves as an automatic bar to such claims. Rather, a jury must determine whether the Mladineos' reliance on Schmidt's misrepresentations, clothed with apparent authority, were reasonable. Summary judgment was completely inappropriate as to the Mladineos' agency-based contract claims against Nationwide.

Moreover, public policy prohibits the result adopted by the Trial Court. First, the Nationwide Parties should not be able to escape liability given their deviation from the standards and practices mandated by the National Flood Insurance Program in failing to offer the Mladineos a flood policy. Second, public policy requires that there should be a remedy for every wrong done to one by another. Third, the Mississippi Legislature has established certain duties and standards for insurance agents, through its statutory scheme requiring initial testing for licensure and mandatory continuing education credits in order to maintain their license. Nationwide itself holds its agents out as professionals with "expert knowledge." The Nationwide Parties' position as adopted by the Trial Court renders the legislature's regulation meaningless and the Nationwide Parties' promises of "expert agent advice" worthless. Lastly, if the Court accepts the Nationwide Parties' interpretation of the law, agents and insurance companies could market, sell and induce consumers to purchase policies through any manner of misrepresentations or misconduct, yet be totally absolved by simply delivering a policy to the unsuspecting consumer, one that contained whatever coverage the insurance company wanted, or for that matter, no coverage at all. Certainly, this is not the intention of Mississippi Legislature or the common law and is against public policy.

The bottom line is that this case is about the indefensible and grossly negligent acts of a Nationwide agent and the acceptance, even endorsement, of those acts by Nationwide. Having endorsed the negligent acts of its agent and forcing the Mladineos to file suit, Nationwide is now fighting vigorously to obtain this Court's stamp of approval for such conduct. If Nationwide succeeds in its mission, there will be created in this State an unbridled opportunity for oppression by insurance companies over consumers, while leaving consumers without even the possibility of redress in courts of this State. If the wrongdoing by Nationwide and its agent in this case is ratified

by this Court, then there will be no limit in Mississippi to the transgressions in which an agent and an insurance company can engage without fear of consequence. This is not the first time that Nationwide has appeared before this Court seeking approval for an unconscionable result in its actions against its homeowner-insureds in the State of Mississippi, specifically relating to damages suffered during Hurricane Katrina. With this Court's help, it could, however, be the last.

Clearly there are a multitude of material facts that must be evaluated and determined by a jury with regard to each of the Mladineos' claims. Furthermore, the Nationwide Parties waived any argument based on the "duty to read" defense. Moreover, public policy **requires** responsible behavior on the part of a licensed insurance agent in order to protect the interests of the consumer and the imposition of liability arising from the wrongful actions of the insurance agent. Based on these considerations, the Trial Court's awarding of summary judgment was inappropriate and must be reversed by this Court.

ARGUMENT

I. THE NATIONWIDE PARTIES WERE NOT ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW. THE MLADINEOS ARE ENTITLED TO PRESENT EVIDENCE OF SCHMIDT'S NEGLIGENT FAILURE TO PROCURE, SCHMIDT'S NEGLIGENT MISREPRESENTATIONS AND OTHER CLAIMS AND TO HAVE THOSE ISSUES AND THE ISSUES OF COMPARATIVE FAULT AND CAUSATION DETERMINED BY A JURY.

The trial court erred in entering summary judgment. Multiple issues of material fact exist which the Mladineos are entitled to present to the jury.

Preliminary to an analysis of the errors of law and the many issues of material fact remaining to be determined by a jury, it would be well to acknowledge the standard of review by this Court of the Trial Court's entry of summary judgment, and to recognize the established guidelines interpreting Miss. R. Civ. P. 56.

The well established standard of review of the Trial Court's grant of summary judgment is *de novo*. *Duckworth v. Warren*, 10 So. 3d 433, 436 (Miss. 2009); *Waggoner v. Williamson*, 8 So. 3d 147, 152 (Miss. 2009). Thus, this Court proceeds unrestrained by its usual, self-imposed deference to the judgments of the courts below. Of course, any and all questions of law raised by the appeal are also reviewed *de novo*. *Irby v. Estate of irby ex rel Marshall*, 7 So. 3d 223, 228 (Miss. 2009).

Rule 56(c) of the Mississippi Rules of Civil Procedure provides that a summary judgment should be granted **only** if there are no genuine issues of material fact **and** if the party seeking the judgment is entitled to same as a matter of law. This Court has held that a fact is material for the purposes of Rule 56 if it tends to resolve any of the issues properly raised by the parties. *Holland*

v. Peoples' Bank & Trust Co., 3 So. 3d 94, 99 (Miss. 2008); *Calvert v. Griggs*, 992 So. 2d 627, 632 (Miss. 2007); *Buchanan v. Ameristar Casino Vicksburg, Inc.*, 957 So. 2d 969, 975 (Miss. 2007). This Court elsewhere has described a material fact as one that matters in an outcome determinative sense. *Bedford Health Properties, LLC v. Estate of Williams ex rel Hawthorne*, 946 So. 2d 335, 340-41 (Miss. 2006).

The Court specifically provided ample guidelines as to how Rule 56(c) should be interpreted and applied. The party offering the motion has the burden of demonstrating that no issues of material fact exist; all reasonable doubts about whether such a material fact exists must be resolved in favor of the non-moving party. *Waggoner*, 8 So. 3d at 152. A non-moving party can defeat a motion for summary judgment merely by demonstrating that an issue of material fact exists. *Flores v. Elmer*, 938 So. 2d 824, 826 (Miss. 2006). All evidence relating to the issues involved in the motion for summary judgment (and its opposition) "must be viewed in the light most favorable to the party against whom the motion has been made." *Waggoner*, 8 So. 3d at 152.

A motion for summary judgment "should be overruled unless the trial court finds, beyond a reasonable doubt, that [a] plaintiff would be unable to prove any facts to support his claim." *Calvert*, 992 So. 2d at 632 (quoting *Simpson v. Boyd*, 880 So. 2d 1047, 1050 (Miss. 2004)). Summary judgments should be granted with great caution. *Pollard v. Sherwin Williams Co.*, 955 So. 2d 764, 768 (Miss. 2007). Such motions are no substitute for a trial of disputed issues. *Anderson v. LaVere*, 895 So. 2d 828, 832 (Miss. 2004). The Court has made it clear that issues of credibility, weighing of the evidence, and drawing of legitimate references from the facts are jury functions, not those of a judge. *Douglas Parker Electric, Inc. v. Miss. Design and Dev. Corp.*, 949 So. 2d 874, 877-78 (Miss. Ct. App. 2007).

The bottom line is that summary judgments are **not** favored and the Trial Courts are to grant them only after great scrutiny of the "pleadings, depositions, answers to interrogatories and admissions on file, together with the [supporting] affidavits, if any." Miss. R. Civ. P. 56(c).

In the following portions of this brief, there will be detailed discussions and analysis of the material facts in dispute, as well as the legal issues involved.

II. THE MLADINEOS' CLAIMS FOR THE NUMEROUS NEGLIGENT ACTS OF THE AGENT, INCLUDING HIS FAILURE TO PROCURE THE COVERAGE SPECIFICALLY REQUESTED AND HIS NEGLIGENT AND ERRONEOUS MISREPRESENTATION OF THE TERMS OF THE POLICY ARE NOT AUTOMATICALLY BARRED BY THE "DUTY TO READ" DEFENSE.[1]

(A) The Mladineos' Claims of Failure to Procure, Negligence and Negligent Misrepresentation Are Viable.

The Mladineos' claims against Schmidt and Felsher for failure to procure (Count I), negligence (Count II) or negligent misrepresentation (Count III) are not barred. The Trial Court improperly disposed of the Mladineos' negligence claims against Nationwide's agents based on the Nationwide Parties' misplaced argument that the Mladineos' negligence claims were barred, as a matter of law, by the "duty to read" defense.

A brief analysis of the legal and factual bases of the Mladineos' claims is appropriate at this juncture. An agent's legal duty to procure the insurance coverage specifically requested by a client is well settled. The applicable governing law on this issue is accurately summarized by Judge L. T. Senter in *Smith v. Nationwide*:

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[1]The Mladineos fully reserve their right to argue in Section IV of the Argument that the Nationwide Parties have waived their right to assert the "duty to read" affirmative defense by waiting over two (2) years from the filing of the Complaint and less than three (3) months before trial, and almost three (3) years after John received ASG's denial letter before raising this issue.

> 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 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.

2009 WL 736199, *6 (S. D. Miss. 2009). The Mladineos' also make a claim for negligent misrepresentation. The elements of a negligent misrepresentation claim are

1. That there was a misrepresentation (or omission) of a fact;

2. The misrepresentation (or omission) was material or significant;

3. The misrepresentation (or omission) was the product of negligence, i.e. that the person making the representation or omission failed to exercise reasonable care;

4. The person to whom the representation was made reasonably relied upon the representation (or omission); and

5. The person to whom the representation (or omission) was made suffered damages as a direct and proximate result of that reasonable reliance.

Id. (citing *Berkline v. Bank of Mississippi*, 453 So. 2d 699 (Miss. 1984); *Spraggins v. Sunburst Bank*, 605 So. 2d 777 (Miss. 1992)).

There are many facts in this case that support the Mladineos' claims for both negligent failure to procure and for negligent misrepresentation. Regarding the Mladineos' negligent failure to procure claim, Schmidt committed numerous negligent acts that caused or contributed to the Mladineos' not having the insurance coverage they needed and had specifically requested. These acts or omissions include the following: affirmatively and specifically misrepresenting the terms of the policy that Schmidt recommended to the Mladineos; failing to mention the exclusions of

coverage contained in the policy he recommended; failing to understand the terms of the policy he recommended; failing to inform the Mladineos that a portion of their property was in a flood zone; failing to recommend and offer a flood policy to the Mladineos; failing to educate himself as to the issues regarding the promotion and selling of flood insurance; failing to keep a complete file and accurate notes regarding his business dealings with the Mladineos; failing to accurately ascertain the full extent, type and nature of the coverage that the Mladineos specifically requested that he obtain for them; and failing to procure the insurance coverage specifically requested.

As to the Mladineos' negligent misrepresentation claim, there is ample evidence that Schmidt materially misrepresented the coverage offered by the policy he recommended. In fact, John made a specific request for coverage for damages caused by all wind and water from all storms. According to John, in response to that specific request, Schmidt told him that the recommended policy did, in fact provide coverage for damages caused by all wind and water from all storms.[2] While Schmidt denies this, a jury could reasonably conclude that John's testimony regarding these discussions between him and Schmidt is more credible than Schmidt's. This issue, whether a misrepresentation was made, is one of material fact for the jury to decide. Additionally, as discussed in the Statement of Facts portion of this brief, there is ample evidence in the record to establish the other four elements of the claim for negligent misrepresentation, which are also jury questions.

[2]It should be noted that the Mladineos' claims against the agents for negligent misrepresentation, while separate and apart from, are closely related to their claims against Nationwide on the contract. That is because Schmidt, who was Nationwide's agent acting with apparent authority, could have contractually bound Nationwide based on the terms as he misrepresented them to the Mladineos. In that regard, the misrepresentations of Schmidt and the Mladineos' reliance on those representations are relevant to both claims, the negligence-based claims against Schmidt and the agency-based contract claims against Nationwide.

The Trial Court's decision ignores all of these negligent acts in favor of an erroneous interpretation of the law under which the **only material** facts considered by the Trial Court were, first, that **a policy of homeowners insurance of some type was issued** by Nationwide to the Mladineos; and, two, that this policy was **received** by the Mladineos. If those two facts were present and undisputed, then, according to the Trial Court, the Nationwide Parties win. According to this view, no other facts are material to a consideration of the Mladineos' claims because all other facts are trumped by, controlled by and subordinate to only two facts: was the policy issued and was it received. The net effect of this interpretation of the law is that an insured is "bound by" the terms of his policy immediately upon receipt of it and before he even has an opportunity to read it.

That is not and should not be the law in Mississippi. Under Mississippi law, as will be shown by a discussion of the relevant cases, the applicability of the "duty to read" defense should be applied both to claims for negligent misrepresentation and for negligent failure to procure only through a comparative fault analysis, which is clearly a question for a jury. That is, the Mladineos are entitled to have a jury decide what portion of their damages were caused by the negligent actions of Schmidt and what portion, if any, were caused by their delay in reading their policy. The "duty to read" defense does not automatically bar either claim, the claim for negligent misrepresentation or the claim for failure to procure the specific insurance coverage requested.

(B) Neither the Mississippi Supreme Court nor the Mississippi Court of Appeals Has Ever Applied the "Duty To Read" Defense Alone as a Complete Bar to Negligence Claims Against an Agent: Other Considerations Have Always Been Present and Have Always Predominated.

While the Nationwide Parties will no doubt urge this Court to focus on isolated quotes and snippets taken out of context, a full reading of the cases shows that the "duty to read" has never

served as an automatic bar to recovery against an agent for negligence surrounding the procurement of insurance. Rather, an analysis of the underlying facts of the relevant cases clearly reveals that even though this Court and the Court of Appeals have used the phrase"duty to read" in their opinions, absolutely none of the cases, whether dealing with failure to procure and/or negligent misrepresentation, was decided on the "duty to read" defense as an **automatic bar**. Either the decisions were based on other legal considerations altogether, or there were extreme factual circumstances **not present in this case** which made the "duty to read" defense applicable as a bar to the insured's claims. Moreover, assuming for purposes of discussion, that knowledge of the terms of an insurance policy are imputed to the policyholder, Mississippi courts have not given much guidance, if any, as to what constitutes a reasonable period of time in which the insured has to "act" on this "imputed knowledge," or what "acts" he must take in light of this knowledge. This seems to have been determined on a case by case basis. Therefore, the facts under which the cases were decided assume a far greater importance than do general statements about a "duty to read," and only the facts of the cases shed any light at all on the issue of when and how an insured must act upon his "imputed knowledge" to protect himself from an agent's negligence.[3]

Some of these cases were relied on by the Trial Court in its Order Granting [the Nationwide Parties'] Motion for Summary Judgment (the "Judgment"), which was prepared by counsel for the Nationwide Parties and adopted by the Trial Court in its entirety. Nationwide Parties' Judgment, as adopted by the Trial Court, contains broad, sweeping language and mistakenly interprets and relies on certain cases by ignoring the important factual distinctions between those cases and the

[3]The principle that a person is deemed to have knowledge of the terms of any contract which he signs is referred to in this brief as the "imputed knowledge" defense.

Mladineos' case. A complete analysis of the relevant cases, including those erroneously relied on by the Trial Court through the Judgment prepared by the Nationwide Parties, follows.

Probably the earliest case on the subject is *Atlas Roofing Mfg. Co., Inc. v. Robinson & Julienne, Inc.*, 279 So. 2d 625 (Miss. 1973). The Nationwide Parties argued in the Trial Court that *Atlas* provides that an insured's failure to read the policy automatically bars recovery for negligence against the agent. The Trial Court adopted the Nationwide Parties' misguided argument with regard to *Atlas* in its Judgment. Such a reading of the case ignores the facts that in *Atlas*, which involved an action against an insurance agent for failure to procure, the uncovered loss occurred approximately **two and a half years** after the policy provisions were disclosed 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. The decision really turned, however, on the insured's failure to join the insuror as a necessary party to the litigation. *Id.* at 628. Without the insuror as a party, the insured could not establish that the insuror had paid the insured a sum less than it was obligated to pay under the terms of the subject policy, and thus, the insured could not establish that the coverage provided by the agent was inadequate. *Id.* In *Atlas*, this Court does not even use the phrase "duty to read," but speaks only of in terms of the insured having "fair notice" of the coverage in the policy, but only after two and a half years of failing to read the policy or question the coverage. *Id.* at 629. At a minimum, and only in the form of dicta, could *Atlas* possibly be authority for the proposition that an insured will be solely at fault, as a matter of law, for failing to read his policy for two and a half years and for failing to complain of agent negligence for five years. As to any shorter periods of time, the question of "when the policyholder should have read and acted" constitutes a genuine issue of material fact to be determined by the jury.

The 1994 case of *Taylor Machine Works v. Great American Surplus Lines*, 635 So. 2d 1357 (Miss. 1994) is particularly instructive. This case included a failure to procure claim against the agent as an alternative plea to a claim for policy coverage against the insuror. *Id.* at 1360. In that case, this Court affirmed summary judgment in favor of the insurance company on the insured's contract claim, because the policy clearly excluded the coverage for the loss incurred. *Id.* at 1361. However, the Court reversed summary judgment in favor of the agent on the negligence claim and remanded the matter back to the trial court for trial on the issue of whether the agent committed negligence in procuring the policy. *Id.* at 1362. This Court recognized that what might be a defense for the insuror in a contract claim on the policy would not necessarily be a defense to an agent in an action for failure to procure. *Id.* The "duty to read" was not discussed as a defense in this case and was not mentioned by the court in its opinion, but in any event, the case establishes that the issuance and receipt of a policy (and even a summary judgment for the insuror on the policy) **does not necessarily bar** a failure to procure claim against the agent. *Id.*

Haggans v. State Farm, another agent negligence case decided by the Court of Appeals, involved an insured that requested coverage, which the agent failed to procure. 803 So. 2d 1249, 1252 (Miss. Ct. App. 2002). The Trial Court wrongly relied on*Haggans* in the Judgment prepared by the Nationwide Parties. While the court did mention that the plaintiff had a "duty to read" his policy and that knowledge of the contents of the policy were imputed to him, these references made no difference in the outcome of the case. *Id.* The case was decided on the undisputed fact that the coverage requested, contents coverage for an unoccupied dwelling, could not have been obtained by the agent from any source in the State of Mississippi. *Id.* The court held that even if the agent committed negligence by failing to procure the insurance requested, there was no causation, because

it would have been impossible for the insured to obtain the coverage he sought. *Id.* Even if this Court gives the Nationwide Parties the benefit of the doubt in its interpretation of *Haggans*, at best, the two factors **combined** (the unavailability of coverage and the failure to read the policy) made it impossible for the plaintiff to prove causation. Even this interpretation of the case is a far cry from the "duty to read" alone serving as an automatic bar to recovery. Either way, *Haggans* is of no precedential value to the case at bar, because the coverage Schmidt negligently failed to procure here (flood coverage) was readily available. The undeniable fact is that *Haggans* did not turn at all on the "duty to read" defense, but on the fact that the requested coverage was unavailable. *Id.*

Another negligent failure to procure case that was cited by the Trial Court, *Oaks v. Sellers*, was also decided primarily upon consideration of factors other than the "duty to read" defense. 953 So. 2d 1077, 1083 (Miss. 2007). In *Oaks*, this Court relied primarily on the statute of limitations to defeat the claims of the insured. *Id.* The Court noted that knowledge of the terms of the policy were imputed to the insured, but in that case, the 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. *Id.* at 1083-84. Once again, this Court in reaching its decision, relied on considerations beyond a strictly construed "duty to read" defense. *Id.* These other considerations included actual notice of the policy's coverage for four years with at least one renewal, the insuror's denial of a claim made under the questioned coverage, and the admission by the insured that he did not specifically request the questioned coverage. *Id.* Again, the Court's references to the "duty to read" defense could, at most, be interpreted to imply that four years, as a matter of law, is a long enough period of time in which the insured should have taken some action to protect himself.

Since a significant portion of the Mladineos' negligence claims against Schmidt involve Schmidt's negligent misrepresentations, the"reasonable reliance" element of that cause of action is probably due the most attention and consideration here. As to the issue of "reasonable reliance," there are two relatively recent decisions, *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), that are of significance. Although *Merrill* and *Hollins* are factually more directly related to the Mladineos' agency-based contract claim against Nationwide and will be discussed in more detail in that section of this brief, these decisions contain detailed discussions about the issue of "reasonable reliance" as an element of agency-based contract claims. As there is little difference in the analysis of "reasonable reliance" with respect to a negligent misrepresentation claim versus an agency-based contract claim, the *Merrill* and *Hollins* decisions are helpful in explaining "reasonable reliance" as it relates to the Mladineos' claims of negligent misrepresentation.

Hollins involved an agent's misrepresentations and the relationship between "reasonable reliance" and the "duty to read" and "imputed knowledge" concepts. 830 So. 2d at 1235. At the time the agent's misrepresentations were made in *Hollins*, neither the policy nor any other documentation was available to the insured. *Id.* at 1235. The policy was issued and the insured acknowledged receiving it. *Id.* The policy contained a provision that "[n]o agent may change this policy or waive any of its provisions." *Id.* at 1238. Nearly eleven months after the application process, and after the delivery and receipt of the policy, the insured filed a claim under the coverage she thought she had, based on the misrepresentations of the agent. *Id.* The claim was denied and the insured filed suit which resulted in a verdict in favor of the insured. *Id.* at 1234. The insuror appealed. *Id.*

Although it was regarding an analysis of an agency-based contract claim, one of the significant issues was "reasonable reliance." *Id.* at 1237-38. With regard to "reasonable reliance," this Court's analysis in *Hollins* is just as applicable to the "reasonable reliance" element in the Mladineos' negligent misrepresentation claim. The Court pointed out that at the time the misrepresentation was made, the insured, Hollins, did not have the benefit of the policy and or any other documentation that contradicted the agent's misrepresentations:

> 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.**

Id. at 1238 (emphasis added) (internal citations omitted). The Court also specifically addressed whether the "duty to read" and the "imputed knowledge" doctrines amounted to being automatically "bound by" those terms:

> 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.**

Id. at 1243-1244. Clearly, Mississippi law does not recognize the strictly construed application of the "duty to read" defense as applied by the Trial Court.

Interpreting *Hollins*, a well-respected Mississippi treatise, Mississippi Insurance Law and Practice § 2:7, recognized that under *Hollins*, "[a]n insured who neglected to read a policy (and, who

therefore, had imputed knowledge of its terms) **was not automatically bound by the policy's terms**." Rather, under *Hollins*, the insured will prevail if there was "reasonable reliance":

> [U]nder *Hollins*, while there may have been a duty to read a policy in Mississippi, the consequences of failure to read did not mean that what was not read was always binding on the insured. Under *Hollins*, where an insured sought rights at variance with an insurance policy through waiver or estoppel, or through actions of an agent within the agent's actual or apparent authority, **the fact that an insured did not read the policy did not serve as automatic bar to such recovery**. However, insofar as one of the doctrines used by insureds to procure rights at variance with the policy requires that the insured prove justifiable reliance on the insurers actions, it appeared that even the *Hollins* court might recognize that failure to read policy terms would still be relevant in determining **whether the insured's reliance was reasonable, as a matter of fact** . . . . Importantly, the *Hollins* Court opinion makes clear that an insured could prove "reasonable" reliance on an agent's misrepresentations, even when the insured did not read the policy. **Under *Hollins*, where an insured did not read the policy, an insured's reliance on an agent's misrepresentations of coverage were not unreasonable as a matter of law and could be shown to be reasonable as a matter of fact.**

Miss. Ins. Law and Prac. § 2:7 (emphasis added).

Merrill, which also involved an analysis of contract-based claims, also offers a significant insight into the analysis of "reasonable reliance" that is equally applicable to negligent misrepresentation. 978 So. 2d at 632. In *Merrill*, the insured purchased a policy based on misrepresentations of an agent. *Id.* at 622. The Court considered whether, in the face of the "duty to read" defense, the agent misrepresented the terms of the policy was even relevant, and the Court concluded that it was. *Id.* at 632. In a "reasonable reliance" type of analysis, the Court stated that the insureds' claim was not barred by the "duty to read" defense, because the insured's reliance on the misrepresentations was reasonable given that the insureds did not have the policy in their possession at the time the misrepresentations were made. *Id.* at 632.

The Fifth Circuit in *Leonard v. Nationwide Mutual Ins. Co.*, 499 F.3d 419 (5th Cir. 2007), a case relied on by the Trial Court in the Judgment prepared by the Nationwide Parties, may appear, at first blush, to take a much different view of Mississippi law than does the *Merrill* Court. But that may **not** be the case. In any event, *Merrill* and *Hollins* are the controlling authorities here, not *Leonard*, if the two are in conflict with *Leonard*. *Leonard*, in addition to being a Fifth Circuit case decided prior to *Merrill*, involves claims of negligent misrepresentation under a different set of factual circumstances from those in this case. The key distinction is that the alleged misrepresentations in *Leonard* took place **after** the policy had been issued and received, not **prior to** the purchase of the policy, as here. *Leonard*, 499 F. 3d at 425. Furthermore, the alleged misrepresentation, if any, was made **ten years** after the policy was issued, and during that entire time, the policyholder had the policy in his possession. *Id.* Also, the policy's annual renewals over the ten-year period of time provided actual notice to the insureds that their policy did not provide the insurance the insureds claimed the agent failed to provide - flood coverage. *Id.* The Fifth Circuit's holding was not that the Leonard's claim was automatically barred because of the duty to read defense, but that under the extreme facts of *Leonard* (i.e. reliance on the representations of an agent contrary to a policy in place for ten years) reliance was unreasonable as a matter of law. *Id.* at 438-42. In the present case, the Mladineos had their policy for a mere four months prior to their discovery that the policy did not provide the coverage they specifically requested: coverage for all wind and water damage from all storms. Obviously, four months is not even close to the ten-year time period involved in *Leonard*. Moreover, the Mladineos, unlike the situation in *Leonard*, did not have the policy or other documentation available to them at the time of Schmidt's misrepresentations

and the time those material misrepresentations were relied upon by the Mladineos in purchasing the policy.

Another relevant case, *Stephens v. Equitable Life Assurance Society of the United States*, 850 So. 2d 78 (Miss. 2003), which was wrongly relied on by the Trial Court, was another pre-*Merrill* case regarding the negligent misrepresentations of an agent. *Stephens* turned on the statute of limitations not the "duty to read" defense. *Id.* at 83. Additionally, in *Stephens*, the policy had been in effect for **twenty-nine years** prior to the insureds raising a complaint as to the misrepresentation of its terms. *Id.* at 80-81. *Stephens* is not authority for the proposition that once the policy is received, the policyholder is immediately barred as a matter of law from maintaining an action on the policy by relying on representations of an agent. Since the case turned on the statute of limitations, the discussion of reliance was merely dicta, and even then only in support of the proposition that **twenty-nine years** is, as a matter of law, an unreasonable period of time for a policyholder to rely on statements of the agent contrary to the terms of the documentation held by the insured at the time the misrepresentations were made. The Mladineos in the present case did not have their policy for twenty-nine years, but for a mere four months. There is no authority that four months is an unreasonable period of time as a matter of law.

Finally, the most recent decision on point, *Smith v. Nationwide Insurance Co.*, out of the Southern District of Mississippi, very clearly recognizes the claim against an insurance agent for negligent misrepresentation. 2009 WL 736199. In *Smith*, as set forth above, the court described the existence of a cause of action against an agent for failure to procure and clearly outlined the elements of a negligent misrepresentation claim in general as those to be considered in a negligent misrepresentation claim against an insurance agent. *Id.* Although, the plaintiff in *Smith* had failed

to state a claim against the agent in that case, the court nevertheless, clearly treated the causes of action as viable. *Id.* With respect to the potential liability of the agent the court stated,

> 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 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). If a customer requests a particular type of coverage in a particular amount, the agent is obligated to exercise reasonable care to obtain the requested coverage. 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 . . . 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.

Id. at *6.

Interestingly, the court never mentioned the "duty to read" with regard to a negligent misrepresentation claim against an insurance agent. *Id.*[4]

The foregoing case law makes it apparent that under Mississippi law, the failure of a policyholder to read his policy does not constitute a complete bar or defense to an action against an agent for failure to procure and negligent misrepresentation. Rather, it is apparent that the duty to

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[4]The Trial Court, in its Judgment prepared wholly by the Nationwide Parties, relied on several other cases for general statements of law that are so factually different from the case at bar that a full analysis of those cases is unwarranted. *Certain Interested Underwriters at Lloyds v. Gulf Nat'l Life Ins. Co.*, 898 F. Supp. 381 (N.D. Miss. 1995) (involving ambiguity in a policy not failure to procure or negligent misrepresentation); *Gulf Guar. Life Ins. Co. v. Kelley*, 389 So. 2d 920 (Miss. 1980) (involving an argument that certain terms in a master policy were "secret," but no allegations of misrepresentation or failure to procure); *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); *Titan Indem. Co. v. City of Brandon*, 27 F. Supp. 2d 698 (S.D. Miss. 1997) (concerning terms of the policy unknown to the insured; no allegations of misrepresentation or failure to procure); *Ballard v. Comm. Bank of DeKalb*, 991 So. 2d 1201 (Miss. 2008) (involving a typical contract transaction where the contract was reviewed prior to signing, not an insurance policy). Additionally, with regard to the Mladineos' negligent misrepresentation claim, the Trial Court relied on cases that are factually dissimilar to the present case. *Ballard*, 991 So. 2d 1201; *Oaks*, 953 So. 2d 1077 (involving failure to explain terms of a policy, not a misrepresentation of those terms).

read is a defense of comparative fault, which must be considered by a jury, just as in any negligence action.

This was not a case in which the Mladineos had the benefit of their policy for such an extended period of time, as in the cases discussed above in which it was implied that the insured would be considered **solely** at fault, as a matter of law. *Atlas*, 279 So. 2d 625 (insured had policy for two and a half years and did not complain of agent negligence for five years); *Oaks*, 953 So. 2d 1077 (insured had the policy for four years). Rather, the Mladineos had their policy for a mere four months. Likewise, this was not a case in which the coverage was not available such that proving causation would be impossible. *Haggans*, 803 So. 2d 1249 (Miss. Ct. App. 2002) (no causation because coverage sought was wholly unavailable). To the contrary, flood coverage was readily available in the present case.

Regarding the Mladineos' negligent misrepresentation claim, this was not a case in which the Mladineos' had their policy for such an extended period of time that reliance was unreasonable as a matter of law. *Leonard*, 499 F. 3d 419 (reliance unreasonable as a matter of law after possession of the policy for ten years); *Stephens*, 850 So. 2d 78 (where insured had the policy for 29 years, reliance was unreasonable as a matter of law). Again, the Mladineos had their policy for a mere four months. Additionally, this was not a case in which, at the time Schmidt made the material misrepresentations, the Mladineos had in their possession written terms contrary to Schmidt's misrepresentations, such that their reliance would have been unreasonable as a matter of law. *Leonard*, 499 F. 3d 419 (insureds had contradictory written terms in their possession at the time the misrepresentations were made, thus reliance was unreasonable as a matter of law). The Mladineos had **no document** in their possession at the time Schmidt materially misrepresented the terms of the

policy. Instead, the misrepresentations took place weeks before any contrary written terms were made available to the Mladineos.

It is apparent after reviewing the cases that the "duty to read" defense will only serve to bar an insured's claims under certain factual circumstances, none of which are present here. With respect to failure to procure, the "duty to read" is applied with regard to the element of causation. Only where there can be no causation (the coverage is unavailable) or where causation is solely that of the insured's (failure to read the policy for an extremely long period of time), will the "duty to read" serve as a complete bar as a matter of law. Otherwise, there are material facts, including the insured's delay in reading the policy, that must be determined by a jury to determine comparative fault. Regarding negligent misrepresentation claims, the "duty to read" defense is applied to the element of "reasonable reliance." Only where the facts dictate that reliance cannot be reasonable (extremely long periods of time or possession of contrary terms at the time the misrepresentation is made) will the "duty to read" defense serve as a complete bar as a matter of law. **None** of the factual circumstances under which the "duty to read" defense would serve as a complete bar to a failure to procure or negligent misrepresentation claim are present in this case. Thus, all the disputed facts are material to a jury's determination of comparative fault as to causation or reasonable reliance.

There are many such material facts that must be determined by the jury. As noted earlier, there is a dispute as to the contents and substance of the conversation between John and Schmidt regarding the coverage requested and the misrepresentations of the insurance policy recommended by Schmidt as providing the coverage that John requested. John contends that he made a specific request for coverage for all wind and water damage from all storms while the Nationwide Parties contend that he made a general request for "full coverage." Depo. John Mladineos 51:5-16, 50:11-15

(Mar. 4, 2008). Likewise, regarding Schmidt's representations, John contends that Schmidt represented that the policy Schmidt recommended to John provided coverage for all wind and water damage caused by all storms. Depo. John Mladineos 51:5-16 (Mar. 4, 2008). What is not disputed is that Schmidt admitted he did not offer John a flood policy. R. V. 4 at 588. The dispute of facts is further underscored by the Nationwide Parties having taken three contradictory positions, (apart from the Mladineos' allegations), of the representations made or not made and the actions taken or not taken by Schmidt. 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). Under *Hollins* and *Merrill*, these disputed facts are material and thus for the jury to determine.

Other issues of material fact relate to the negligent acts by Schmidt (specific instances of failure to exercise reasonable care) in the process of obtaining the insurance coverage requested. As noted, Schmidt kept no file, made no documentation of his dealings with John, did not obtain a signed application, did not completely inspect the property, did not inform John of the fact that a portion of the property was in a flood zone, did not recommend or offer a flood policy to John, and did not adequately discuss with John sufficient facts to allow Schmidt to fully understand and appreciate the coverage being requested, including what John meant by "water," or to allow John to understand the limited coverage recommended by Schmidt, since the policy exclusions were never discussed. Depo. Richard Schmidt 75:23-76:5, 84:8-85:4 (Jan. 11, 2008); R. V. 14 at 2100; R. V. 15 at 2101. Whether these acts constituted negligence on the part of Schmidt and whether those negligent acts caused the Mladineos' damage are questions for the jury. The Mladineos expect their experts to testify at trial that such acts by Schmidt violated the standards of care in the industry, while the Nationwide Parties' experts are expected to testify as to the opposite. These opinions

should be weighed by the trier of fact. At the same time, the jury must determine whether the Mladineos' delay in reading their policy and delay in complaining about the policy coverage beyond a period of time of four-months constituted negligence on their part. In other words, who bears what amount of fault for the loss suffered by the Mladineos is a matter not foreordained as a matter of law sufficient to justify a summary judgment, but rather, is a question for the jury.

Likewise, as to the Mladineos' negligent misrepresentation claims, whether Schmidt made a misrepresentation, whether Schmidt's misrepresentation was material or significant, whether Schmidt's misrepresentation was a product of negligence, whether the Mladineos reasonably relied on Schmidt's misrepresentation and whether the Mladineos suffered damages as a result thereof, are all questions for the jury to decide. Clearly, summary judgment was inappropriate and the Judgment of the Trial Court should be reversed.

III. NATIONWIDE, IN SPITE OF A READILY APPARENT CONFLICT BETWEEN THE INTERESTS OF ITS POLICYHOLDERS AND ITS AGENTS, VOLUNTARILY UNDERTOOK TO INVESTIGATE THE CLAIMS OF AGENT ERROR. NATIONWIDE HAD A DUTY TO CONDUCT A FAIR, PROMPT AND ADEQUATE INVESTIGATION OF THE CLAIMS OF AGENT ERROR. NATIONWIDE'S FAILURE TO MEET THOSE STANDARDS IS ACTIONABLE IN TORT.

The Trial Court should not have granted summary judgment dismissing the Mladineos' claims for independent tort, breach of duty of good faith and fair dealing, tortious breach of contract and bad faith. The Mladineos should have had the right to present to the jury the material facts underlying those claims, and to have had the jury instructed on the evidence as presented, irrespective of the name or names of the particular torts.

Generally, two sources exist for causes of action in tort. First, torts (civil wrongs) arise out of the underlying principle that no person, without justification or right, should act in a way to injure another in his person or property. 74 Am. Jur. 2d *Torts* § 1 (2009). Second, torts can arise out of an existing contract. *Id.*

Three separate business and professional transactions took place between the Mladineos and one or more of the Nationwide Parties in the period of time in which the Mladineos claims evolved and arose. Each involved separate, but yet, interconnected legal duties. The first of the three transactions was between the Mladineos and Schmidt in which the Mladineos sought to obtain the assistance and advice of Schmidt in obtaining specifically requested insurance coverage for all water and wind damage by all storms for their soon-to-be purchased home. In addition to numerous acts of negligence to exercise reasonable care, Schmidt misrepresented to the Mladineos that the policy he recommended would provide the coverage specifically requested. In this first transaction Schmidt was acting both as an agent for the insured and as an agent for Nationwide.

The second transaction consisted of Nationwide, at Schmidt's request, issuing to the Mladineos a policy of homeowners insurance, which did not provide the specific coverage requested. That policy was issued without either of the Mladineos having seen the policy or any summary or specimen thereof, although the premium was paid and collected prior to issuance.

The third transaction was the purported "investigation" of Schmidt's "agent error" (the errors and omission claim) by Nationwide's Agents Support Claims Program, also known as Agents Support Group ("ASG"). Nationwide had a legal duty to deal fairly and in good faith with its insured, and to conduct a prompt, reasonable and adequate investigation of a claim of its insureds against the agents, whether existing under the present case authorities or under general principles of

tort law that prohibit it from acting negligently or knowingly without justification, in a way that causes injury and damages to the Mladineos.

Nationwide seeks to defeat its own insureds' legitimate actions against the agent. This is the wrong, irrespective of the name applied to it, for which recovery is sought.

This Court has been very clear that every contract contains an implied covenant of good faith and fair dealing in the performance and enforcement of the contract. *Robinson v. Southern Farm Bureau Cas. Co.*, 915 So. 2d 516, 520 (Miss. 2005); *Langston v. Bigelow*, 820 So. 2d 752, 756 (Miss. 2002); *Cenac v. Murry*, 609 So. 2d 1257, 1272 (Miss. 1992). The implied duty of good faith and fair dealing also applies to insurance contracts such as the one that is the subject of this suit. *Robinson*, 915 So. 2d at 520. Nationwide's failure to adequately, promptly and properly investigate whether their agents committed negligence in procuring the specifically requested insurance coverage is a clear breach of an implied covenant of good faith and fair dealing between Nationwide and its policyholders. Such conduct may also constitute a tort, as being behavior that violates legitimate issues of public policy, common sense and fairness.

The standards by which an insurance company investigates any claim are well established: the investigation of the circumstances surrounding any claim must be prompt, reasonable and adequate. *Liberty Mut. Ins. Co. v. McNeely*, 862 So. 2d 530, 555 (Miss. 2004); *Life & Cas. Ins. Co. of Tenn. v. Bristow*, 529 So. 2d 620, 623 (Miss. 1988); *Bankers Life & Cas. Co. v. Crenshaw*, 483 So. 2d 254, 276 (Miss. 2005). The Court in *Bankers Life* held that "an 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.**" 483 So. 2d at 276 (emphasis added). The Court also noted that in performing the required investigation, a realistic evaluation of

the claim, an insuror "**has a further duty . . . to tell the insured, its customer, the plain truth** . . . . [I]f the insurance company cannot give its insured a valid reason for denying the claim, it has a final duty to promptly honor it." *Id.* (emphasis added). Nationwide made no such investigation. Nationwide employees conducting the "investigation" were not provided any company-wide standards or guidelines by which to measure Schmidt's conduct in procuring the specifically requested insurance coverage. Nor did Nationwide determine the existence of any local agency standards or guidelines of agent conduct in the selling of insurance products. In Felsher's deposition, he indicated there were certain accepted practices which he had taught to his agents, and, which he expected them 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). It would appear that Schmidt did not follow all of these practices. The totality of the investigation consisted of several telephone conversations and an alleged review, and prompt disregard of the documents submitted to them by John. Public policy considerations regarding the promotion and selling of flood insurance policies were never considered during the investigation. There was absolutely no "on-the-ground" investigation in this matter, nor any

verification or corroboration of the statements made by either Schmidt or John. No recordings were made of the telephone conversations, nor any sworn statements obtained. Thus, Nationwide had neither the means or the ability to determine the credibility of the statements made by John or Schmidt. The issue of credibility was commented on and reported by the Mladineos' experts. R. V. 15 at 2111-41. Schmidt's testimony was found by the experts to be inconsistent, thus raising doubts about the credibility of his testimony, while John's testimony was found by the experts to be consistent, and therefore more believable. R. V. 15 at 2111-41.

Nationwide purportedly undertook to investigate whether Schmidt made any errors in the procurement of the insurance coverage. Even though Nationwide's correspondence to John indicated a finding of "no agent error," Nationwide's witnesses later testified that a determination as to any agent error by Schmidt was purportedly never reached, and that such a decision was preempted by Nationwide's determination that John had a "duty to read" his policy. As a result, Nationwide said that there was no need to complete the investigation nor to make a decision about whether Schmidt made any errors in procuring the insurance coverage, even though they undertook to conduct an investigation of that issue. Even after Schmidt recanted his story, by finally admitting to Nationwide in February 2006, that **he failed to inform John of the flood exclusion** in the recommended policy, Nationwide still refused to conduct an adequate investigation, as John requested, and as this Court requires. Thus, according to Nationwide's view, "duty to read" trumps any agent error in the procurement of the requested insurance coverage.

The Mladineos' expert witnesses have reported, and are expected to testify, that Nationwide did not follow industry wide standards, nor did Nationwide conduct a complete, objective and fair investigation or make a realistic evaluation of the errors and omissions claim. R. V. 15 at 2111-41.

These issues should be considered by the jury in deciding whether the acts or omissions of Nationwide constitute breaches of a duty owed to the Mladineos. This Court has held in *Murphree v. Federal Ins. Co.* that where the parties dispute the existence and legitimacy of various reasons for delay or denial of a claim, these issues are ones of material fact, and the insureds are entitled to have a jury pass upon their claim. 707 So. 2d 523, 529 (Miss. 1998).

The Nationwide Parties have argued that because John had a "duty to read his policy," their denial of the errors and omissions claim was not a breach of contract, and thus, there can be no breach of the duty of good faith and fair dealing, even as it relates to their investigation as to whether Schmidt committed error. The issue as presented by the Mladineos' Second Amended Complaint, is whether Nationwide's volunteering to serve as Schmidt's errors and omissions carrier, along with its relationship with John as its insured, imposed a duty on Nationwide to conduct a complete, fair and objective investigation of whether Schmidt committed negligence in the procurement of the specifically requested insurance coverage and whether that duty was breached. Contained within that issue is whether Nationwide acted irresponsibly by acting in such a capacity with the inherent conflict of interests involved; i.e., the competing interests between its policyholders and its agents. The conflict involved among the competing interests is clearly formulated and recognized in Nationwide's own correspondence to its agents and to its policyholders. In the letter to Felsher dated October 27, 2005, the day following the filing of the errors and omissions claim, Nationwide admits that the intent of the investigation was to support its agent and to determine whether there was an error on the part of the agent:

> As a member of Nationwide Agents Support Claims, **we strive to support you.**
>
> * * *

> Once the investigation is completed, we will contact you to discuss our findings. Should it be determined that there was **an agent error or omission** which resulted in a claims payment . . . .

R. V. 14 at 2033 (emphasis added).

In letter of November 17, 2005 to Felsher, Nationwide's Agent Support Claims, in advising Felsher of a finding of "**no agent error regarding the flood issue,**" Nationwide confirmed its earlier stated intention to support its agent:

> As a Nationwide agent, **we strive to support you**. We want to reward the loyalty of our valued customers by taking the time to evaluate each claim in a timely manner. We understand that we can not always provide the **desired outcome** when determining claims, but **we make every effort to value you and your contributions to the company**.

R. V. 15 at 2103-04 (emphasis added).

On November 15, 2005, two days prior to Nationwide's letter of November 17 to Felsher, Nationwide wrote John stating its support of its "valued customers" (policyholders) in pursuing claims of agent error:

> At Nationwide, we strive to differentiate ourselves with the highest level of customer service. We want to reward the loyalty of our valued customers by **taking the time necessary** to evaluate **each claim** in a **timely** and **fair manner**.

R. V. 15 at 2105-06 (emphasis added).

Considering Nationwide's separate written statements of support for the **competing and conflicting interests** of its agents, on the one hand, and of its policyholders on the other, how is it possible for Nationwide to conduct an investigation that is "fair" (as it held itself out to its policyholders as doing), as well as one that is prompt, is adequate and reasonable, as required by Mississippi law? The answer is that it cannot do so, and in fact did not do so.

In light of this obvious conflict of interest, whether Nationwide is liable for its refusal to conduct the required investigation of all facts in a fair and objective manner as to whether Schmidt committed negligence in the procurement of the specifically requested insurance coverage is a question to be determined by the jury. This was preempted by the Trial Court's granting of summary judgment.

Closely related to the breach of good faith and fair dealing are the Mladineos' claims of tortious breach of contract and bad faith. Under Mississippi law, it is true that the Mladineos must show that Nationwide had no "reasonably arguable reason" to deny their claim. The Mladineos' tortious breach of contract and bad faith and other tort claims are not related to Nationwide's initial denial of the Mladineos' claim for water damage, which Nationwide denied based on the terms of the policy. Rather, the Mladineos' tortious breach of contract, bad faith and other tort claims arise out of Nationwide's negligence, gross negligence, malice and reckless disregard of the rights of the Mladineos in how ASG conducted the investigation of the errors and omissions claim, when John brought to ASG's attention the misrepresentations and negligence of the agents, and ASG's disregard of the inherent conflicts of interest involving its policyholders, its agents and itself, when it ultimately determined to deny the Mladineos' errors and omissions claim. In other words, Nationwide wrongfully denied without arguable reason the Mladineos' claims for the negligent acts of the agents and breach of the duties imposed upon the agents to exercise reasonable care in obtaining specifically requested insurance coverage. This is a question ultimately for the jury to determine. Therefore, the summary judgment as to the Mladineos' claims of tortious breach of contract, bad faith and tort claims should be reversed.

IV. THE NATIONWIDE PARTIES WAIVED THE "DUTY TO READ" DEFENSE BY (A) NOT INCLUDING IT IN THEIR DENIAL LETTERS TO THE MLADINEOS PRIOR TO LITIGATION; (B) FAILING TO PLEAD IT AS AN AFFIRMATIVE DEFENSE IN ANY RESPONSIVE PLEADING FILED IN THIS CASE PRIOR TO FILING THE MOTION FOR SUMMARY JUDGMENT; AND (C) ACTIVELY PARTICIPATING IN THIS LITIGATION FOR OVER TWO YEARS BEFORE RAISING IT FOR THE FIRST TIME IN THE MOTION FOR SUMMARY JUDGMENT.

The Trial Court, through its adoption of the Judgment wholly drafted and submitted by the Nationwide Parties, held that the Nationwide Parties had not waived their right to seek summary judgment based on the duty to read defense. The affirmative nature of such a defense requires the Nationwide Parties to plead and pursue the enforcement of the defense in a timely manner. *MS Credit Ctr., Inc. v. Horton*, 926 So. 2d 167, 180 (Miss. 2006) (citing Miss. R. Civ. P. 8(c)). A defense is characterized as 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 Div. 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.

In *MS Credit Center,* this Court addressed the consequences of failing to timely pursue an affirmative defense while participating in extensive litigation. 966 So. 2d at 180. The defendant, MS Credit Center, asserted affirmatively in its answer that plaintiff's claims should be submitted to binding arbitration. *Id.* at 169. However, rather than immediately bringing the affirmative defense to the attention of the court by pursuing a motion to compel arbitration and setting such a motion for hearing, the defendants actively and extensively participated in litigation for a period of eight

months. *Id.* at 180. Acknowledging that a mere delay in pursuing an affirmative defense alone would not constitute grounds for waiver, the Court held that where there is a "substantial and unreasonable delay" in pursuing the defense, coupled with active participation in litigation, the Court would not hesitate in finding a waiver of such an affirmative defense.

In *MS Credit Center*, the court broadly applied the rules by holding that a "defendant's failure to timely and reasonably raise and pursue the enforcement of **any affirmative defense** or other affirmative matter or right which would serve to terminate or stay the litigation, coupled with active participation in the litigation process, will ordinarily serve as a waiver." *Id.* (emphasis added).

In their Original Complaint filed on September 9, 2006, the Mladineos alleged that they purchased the insurance policy from the Nationwide Parties and that they received a copy of the insurance policy. Despite having knowledge of the facts giving rise to their affirmative defense immediately upon receipt of the Complaint, the Nationwide Parties waited over two years from the filing of the Complaint and less than three months before trial, and almost three years after John received ASG's denial letter, to bring this affirmative defense before the court. In the meantime, the Nationwide Parties participated in litigation by written discovery, conducting depositions, agreeing to two separate scheduling orders and the setting of two different trial dates, and got within six weeks of the first trial date without raising the defense. This Court has previously classified this exact conduct as "active participation in litigation." *Id.* at 179. The Nationwide Parties have provided no justification for participation in costly litigation when the facts giving rise to their duty to read affirmative defense were known at onset of this litigation. The court in *MS Credit Center* concluded that "absent extreme and unusual circumstances," an eight month delay in the assertion and pursuit of an affirmative defense coupled with active participation in litigation constitutes

waiver as a matter of law. *Id.* Mississippi courts have recently classified a nearly two year delay between the assertion of an affirmative defense in the answer and the enforcement of that defense as "unreasonable." *East Miss. State Hosp. v. Adams*, 947 So. 2d 887, 891 (Miss. 2007); *Whitten v. Whitten*, 956 So. 2d 1093, 1099 (Miss. Ct. App. 2007).

There is absolutely no evidence in the record constituting "extreme and unusual circumstances;" therefore, the Nationwide Parties' failure to assert this affirmative defense and their delay of over two years in pursuing it is without justification and unreasonable, as a matter of law. The Trial Court was in error in its ruling that the Nationwide Parties had not waived their "duty to read" affirmative defense, and this Court should reverse the Trial Court's Decision on these grounds alone.

V. THE "DUTY TO READ" DEFENSE DOES NOT AUTOMATICALLY BAR A CLAIM AGAINST AN INSURANCE COMPANY FOR THE MISREPRESENTATIONS OF ITS AGENT ACTING WITH APPARENT AUTHORITY.

(A) This Court Recognizes That an Agent Can Act to Contractually Bind His Insurance Company Principal Irrespective of the Language of the Policy.

This Court recognizes that an agent can act to bind his insurance company principal irrespective of the language of the policy. General law of agency applies to insurance agency relationships. *Ford v. Lamar Life Ins. Co.*, 513 So. 2d 880, 888 (Miss. 1987); *Gulf Guar. Life Ins. Co. v. Middleton*, 361 So. 2d 1377, 1382 (Miss. 1978); *McPherson v. McLendon*, 221 So. 2d 75, 78 (Miss. 1969). In *Germania Life Insurance Co. v. Bouldin*, this Court said:

> The powers possessed by agents of insurance companies, like those of any other corporation or of an individual principal, are to be interpreted in accordance with the general law of agencies. No other or different rule is to be applied to a contract of insurance than is applied to other contracts. **The agent of an insurance company**

> **possesses such powers . . . as have been conferred verbally or by the instrument of authorization, or such as third persons had a right to assume that he possesses under the circumstances of each particular case.**

100 Miss. 660, 678, 56 So. 609, 613 (Miss. 1911) (emphasis added). A principal is bound by the actions of its agent within the scope of that agent's real or apparent authority. *Ford*, 513 So. 2d at 888; *Baxter Porter & Sons Well Servicing Co., Inc. v. Venture Oil Corp.*, 488 So. 2d 793, 796 (Miss. 1986); *Parmes v. Illinois Cent. Gulf R. R.*, 440 So. 2d 261, 265 (Miss. 1983); *Coll. Life Ins. Co. of Am. v. Byrd*, 367 So. 2d 929, 930 (Miss. 1979). Apparent authority exists when a reasonably prudent person, having knowledge of the nature and usages of the business involved, would be justified in supposing, based on the character of the duties entrusted to the agent, that the agent has the power he is assumed to have. *Ford*, 513 So. 2d at 888, *Middleton*, 361 So. 2d at 1383; *Steen v. Andrews*, 223 Miss. 694, 697-98, 78 So. 2d 881, 883 (Miss 1955). "So far as third persons are concerned, the apparent powers of an agent are his real powers." *Mcpherson*, 221 So. 2d at 78 (quoting *Steen*, 223 Miss. at 697-98, 78 So. 2d at 883). Agency rules regarding apparent authority are based on the doctrine of estoppel. *Id.* "A principal having clothed his agent with the semblance of authority, will not be permitted, after others have been led to act in reliance of the appearance thus produced, to deny, to the prejudice of such others, what he has theretofore tacitly affirmed as to the agent's powers." *Id.* One seeking to recover based on the theory of apparent authority must show 1) acts or conduct on the part of the principal indicating the agent's authority, 2) reliance on those acts, and 3) a detrimental change in position. *Ford*, 513 So. 2d at 888, *Middleton*, 361 So. 2d at 1383; *Steen*, 223 Miss. at 697-98, 78 So. 2d at 883. Whether the evidence sufficiently meets the three-prong test of apparent authority is an **issue for the fact-finder**. *Andrew Jackson Life Ins. Co. v. Williams*, 566 So. 2d 1172, 1181 (Miss. 1990); *Venture Oil Corp.*, 488 So. 2d at 796; *Clow Corp. v. J. D. Millican,*

Inc., 356 So. 2d 579, 582 (Miss. 1978); *Byrd*, 367 So. 2d at 930. The Courts have held that an agent acting with such apparent authority can bind his insurance company principal to coverage beyond the specific language of an insurance policy.

This Court acknowledged and applied the doctrine of apparent authority in two recent cases discussed earlier in this brief, *American Income Life Insurance Company v. Hollins*, 830 So. 2d 1235 (Miss. 2002) and *United Insurance Company v. Merrill*, 978 So. 2d 613 (Miss. 2007). Although discussed above with regard to the Mladineos' negligence claims, particularly with regard to "reasonable reliance" as an element in the negligent misrepresentation claim, *Hollins* and *Merrill* are more wholly applicable to the Mladineos' agency-based contract claims, of which "reasonable reliance" is also a part. Consequently, a re-discussion and more full analysis of *Hollins* and *Merrill*, along with other relevant cases is necessary.

Hollins involved not only the concept that an agent's misrepresentations can bind the insurance company to coverage beyond the specific policy terms, but also dealt with the relationship between the "reasonable reliance" element of the apparent authority analysis and the "duty to read" defense. 830 So. 2d at 1235.

In *Hollins*, at the time the misrepresentations were made, neither the policy nor any other documentation was available to the insured, just as in the present case. *Id.* The policy was issued and the insured acknowledged receiving it. *Id.* The policy contained a provision that "[n]o agent may change this policy or waive any of its provisions." *Id.* at 1238. Nearly eleven months after the application process, and after the delivery and receipt of the policy, the insured filed a claim under the coverage she thought she had, based on the misrepresentations of the agent. *Id.* The claim was

denied and the insured filed suit which resulted in a verdict in favor of the insured. *Id.* at 1234. The insuror appealed. *Id.*

On appeal, this Court affirmed a jury verdict for the plaintiff. Portions of the opinion state as follows:

> 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.**

Id. at 1237-38 (emphasis added) (internal citations omitted). The Court dealt specifically with the issue of whether the "duty to read" and the "imputed knowledge" doctrines were the equivalent of being "bound by" those terms:

> 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.**

I at 1243-1244 (emphasis added).

As discussed above, a well-respected Mississippi treatise, Mississippi Insurance Law and Practice § 2:7, interpreting *Hollins* states:

> [U]nder *Hollins*, while there may have been a duty to read a policy in Mississippi, the consequences of failure to read did not mean that what was not read was always binding on the insured. Under *Hollins*, where an insured sought rights at variance with an insurance policy through waiver or estoppel, or through actions of an agent within the agent's actual or apparent authority, **the fact that an insured did not read the policy did not serve as automatic bar to such recovery**. However, insofar as one of the doctrines used by insureds to procure rights at variance with the policy requires that the insured prove justifiable reliance on the insurers actions, it appeared that even the *Hollins* court might recognize that failure to read policy terms would still be relevant in determining **whether the insured's reliance was reasonable, as a matter of fact**.

Miss. Ins. Law and Prac. § 2:7 (emphasis added).

In *Merrill*, the Court, in a unanimous opinion, made it abundantly clear that under appropriate circumstances, the language of the pertinent policy of insurance **"cannot limit the responsibility"** of an insuror for the acts of its agents while acting within the scope and course of his authority. 978 So. 2d at 629 (emphasis added). Quoting its 2002 opinion in *Hollins*, the *Merrill* court wrote:

> We and other courts have held insurers to be bound by the actions of their agents acting within the course and scope of apparent authority *regardless of the policy's actual terms*.

Id. (emphasis in original).

Merrill is significant, because it reaffirmed the principals of the *Hollins* case. *Merrill* involved an insurance agent that misrepresented the terms of a policy in selling the policy to the insured. *Id.* at 622. When it was discovered that the coverage as represented by the agent was not provided in the policy, the insured filed suit against the company and the agent. *Id.* at 616-20. The insuror, relying on the "duty to read" and "imputed knowledge" defenses, maintained that the trial court's admission of the agent's misrepresentations was reversible error, because the misrepresentations attempted to vary the actual terms of the policy contrary to Mississippi law. *Id.* at 632. This Court affirmed the Trial Court, relying on *Hollins*:

> 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).

Id. at 629 (emphasis in original). The Court also noted that since the Merrills did not have the policy before them at the time the misrepresentations were made, but obtained it only after the misrepresentations were made, **the insured's claims were not barred by the "duty to read" or "imputed knowledge" defenses**. *Id.* at 632.

The citation of *Hollins* by the *Merrill* Court is significant. It is certainly not the only case decided prior to *Merrill* holding that an insurance company can be bound by the misrepresentations of its agents while acting within the scope of their apparent authority. If this were the only point that the *Merrill* Court wished to make, it could have done so by citing any number of cases other than *Hollins*. However, it is suggested that it **chose** to cite *Hollins* since it *is* the clearest authority for the propositions that "imputed knowledge" is not the same as "bound by," and that an insured has the opportunity to show as a factual matter that his reliance on misrepresentations of the agent was reasonable; that a jury should determine whether the insured's reliance was reasonable; and that in determining the question of reasonable reliance, the jury may take into consideration the fact that an insured may have had a "duty to read" his policy, and did not do so. This rule of law protects and balances the interests of **all parties** to an insurance contract:

> Under the *Hollins* approach, an insured had a duty to read an insurance policy, and failure to do so would allow imputation to the insured of knowledge of the policy terms. An insured who neglected to read a policy (and, who therefore, had imputed knowledge of its terms) **was not automatically bound by the policy's terms**. The court's opinion, at least implicitly, rejected what may be called a "bound-by-what-you-sign rule." An insured who neglected to read an insurance policy could still procure rights at variance with the written policy, if the insured could prove that the

> agent misrepresented the policy terms, and too, that the insured reasonably relied on the agent's misrepresentation. Importantly, the *Hollins* Court opinion makes clear that an insured could prove "reasonable" reliance on an agent's misrepresentations, even when the insured did not read the policy. **Under *Hollins*, where an insured did not read the policy, an insured's reliance on an agent's misrepresentations of coverage were not unreasonable as a matter of law and could be shown to be reasonable as a matter of fact.**

Miss. Ins. Law and Prac. § 2:7 (emphasis added).

The foregoing cases make it clear that there is **no authority** that the "duty to read" and "imputed knowledge" defenses serve as an automatic bar to the Mladineos' agency-based contract claims. The Trial Court, through the Judgment prepared and submitted by the Nationwide Parties, stretched the rule of law that "an insured has constructive knowledge of the terms of the policy" into meaning that the insured is automatically "bound by its terms." This position is flawed, as it superficially applies an ordinary contract law principle to the purchase of an insurance policy, while ignoring the nature of an insurance transaction. The doctrines of "duty to read" and "imputed knowledge" fit nicely with an ordinary contract transaction, because the contract is negotiated, agreed upon and, most importantly, **available for review**, prior to execution. Therefore, in an ordinary contract transaction, a party has an opportunity to read the policy prior to signing it. Naturally, since he had an opportunity to read it, he is deemed to have read it, understood it, and is imputed with its terms, if he then signs it. However, the transaction of purchasing an insurance policy is a wholly different type of transaction. In the usual insurance transaction, as here, the client requests certain coverage, relies on the agent to provide such coverage, pays a premium up front, but almost never has an opportunity to review the terms of the policy until it is sent in the mail weeks later. In purchasing an insurance policy, there is no bargaining or meeting of the minds in the commonly accepted sense.

Consequently, and contrary to the Trial Court's position, surely the customer must be afforded at least the opportunity to read the policy, understand its terms and challenge the terms, if necessary, before his reliance on the representations of the agent could be said to be unreasonable. It is readily apparent that whether an insured had an adequate opportunity to review the policy is a factual determination that should be made by a jury. Thus, a more accurate statement of the law would be that relying on the representations of an agent with apparent authority, the insured will not be automatically barred from a claim on the contract even if he failed to read his policy, particularly where the insured did not have any document in his possession at the time the misrepresentations were made to indicate contrary terms. An insured has a reasonable amount of time in which to read the policy and act on the contrary terms once received before the contract is closed and the insured can no longer maintain a contract claim against the company. Whether the amount of time was reasonable in which to read and act on the contrary terms in the policy is a question for the jury, a question that must be answered by the jury by considering the totality of the circumstances and the different factors involved, such as the nature and severity of the agent's wrongful actions.

(B) The Mladineos' Contract Claim Against Nationwide for the Misrepresentations of Schmidt Acting with Apparent Authority Is Viable.

The Mladineos' contract claim against Nationwide resulting from the misrepresentations of Schmidt is not barred as a matter of law. The law in Mississippi is that an insuror may be bound by the misrepresentations of its agents acting within the course and scope of their apparent authority regardless of the policy's actual terms. Neither the "duty to read" or the imputed knowledge defense act as an automatic bar to the Mladineos' claims against Nationwide. In spite of the

doctrines of "duty to read" and imputed knowledge, there are factual circumstances that may justify a verdict against Nationwide for the misrepresentations of its agents acting under apparent authority.

Naturally, the Mladineos' contractual claim against Nationwide for the misrepresentations of Schmidt relies on the facts surrounding the actual misrepresentation. Therefore, the factual disputes discussed in the previous section must be resolved in order to evaluate the viability of the Mladineos' claim against Nationwide based on the misrepresentations of its agents. Furthermore, whether the agents were acting with apparent authority are questions for a jury to determine. That is, it is absolutely necessary for the jury to determine the factual issues of the coverage requested, the acts of Nationwide in holding Schmidt out as its agent, the representations of the insurance policy recommended by Schmidt, the reasonableness of the Mladineos' reliance on Schmidt's representations and whether the Mladineos acted reasonably or unreasonably in not seeking further coverage. The viability of the Mladineos' claims against Nationwide for the misrepresentations of its agents is dependent on the resolution of these factual issues, only one of which (reasonable reliance) involves the "duty to read." All of these factual issues, including reasonable reliance considering the "duty to read," are issues that must be left to the jury.

As to the issue of Schmidt's apparent authority, the evidence can support the conclusion of a jury that Schmidt was acting with such authority. Nationwide clothed Schmidt with such authority by providing him with its underwriting documents and by referring to him in those documents as "Agent/Underwriter" and holding him out as having "expert advice." R. V. 5 at 604-05. Nationwide provided no notice on those documents that Schmidt's authority to act for Nationwide in the selling of insurance production was limited in any way. Even though Schmidt did not obtain a signed application for coverage from the Mladineos, the application form itself

provided no notice of any limitations on Schmidt's authority to act for Nationwide notice of any in the selling of insurance products. The only notice of such limitations is contained in the policy itself, which was not made available to John until after the policy was recommended, paid for, and finally received many weeks later. R. V. 1 at 27-66. If Nationwide had wanted to clearly and properly inform third parties of a limitation on the authority of its agents, it would have been very easy to do so. Moreover, Nationwide confirmed Schmidt's apparent authority by issuing a policy of insurance at Schmidt's request. A reasonable jury could conclude from this evidence that Nationwide had clothed Schmidt with apparent authority.

As to the "reasonable reliance" element of the contract claim, John testified that he relied on the advice and recommendations of Schmidt regarding the insurance policy. Such reliance **assumes** that John relied on the underlying authority of the agent to speak for Nationwide in making such recommendations, particularly in the complete absence of any notice to the contrary by Nationwide. The application of the "duty to read" with regard to the contract claim is only to be applied with regard to this element: "reasonableness reliance." In that regard, the cases provide that in the absence of extreme factual circumstances not present here, whether reliance was reasonable should be considered by the jury. Clearly, given the facts if the Mladineos' case, a jury could reach such a factual determination.

Finally, as to the issue of "detriment," in the absence of notice of any type limiting the authority of the agent, it is reasonable for a jury to infer that the agent had full authority to represent the company for all purposes relating to the selling of insurance products. Had there been a question regarding the extent of the authority of the agent, other reasonable inquiries could have been made, or John could have decided not to deal further with the agent at all, thereby not exposing

himself to the loss arising from his subsequent reliance in the misrepresentation of agent as to the policy's terms. Such reliance was therefore detrimental to John's position, and a jury could so find.

Obviously, there are a multitude of material facts at issue to be determined by the jury in its determination of whether Nationwide is to be bound by the misrepresentations of Schmidt through principles of agency. Accordingly, the Trial Court's grant of summary judgment should be reversed as to this claim as well.

VI. CONSIDERATIONS OF PUBLIC POLICY PROHIBIT THE APPLICATION AND INTERPRETATION OF THE "DUTY TO READ" DEFENSE AS INTERPRETED BY THE TRIAL COURT. AN INSURED DOES NOT AND SHOULD NOT, AUTOMATICALLY, UPON RECEIPT OF THE POLICY, BEAR ANY AND ALL LOSSES ARISING OUT OF AND RELATED TO AN AGENT'S NEGLIGENCE, FAILURE TO PROCURE AND MISREPRESENTATION OF THE TERMS OF AN INSURANCE POLICY.

Mississippi courts, in developing the jurisprudence of this state, have frequently considered issues of public policy in fashioning legal solutions involving conduct that, while not illegal, violates the common good or the public conscience, and common sense.

Since the issues in this case involve the allegations of agent negligence in a geographical area having a substantial risk of damage from hurricanes and their associated storm surge, the first and most significant expression of public policy involved is the National Flood Insurance Program ("NFIP") enacted by Congress in 1968, and federal regulations promulgated thereunder, including 44 C.F.R. §§ 62.23 and 62.24 (2009). The regulations provide for a contractual arrangement between the Federal Emergency Management Agency (FEMA) and the Federal Insurance Administration (FIA) with private insurance companies, including Nationwide Insurance Company, in order to implement the provisions of the National Flood Insurance Act of 1968, and the Write-Your-Own Program (WYO), thus allowing a qualified insuror to write flood insurance under its

own name. *Id.* The primary objective of the WYO program is to provide coverage to the maximum number of structures at risk. 44 C.F.R. Pt. 62, App. A. (2009). This goal is to be achieved by the promotion and marketing of flood insurance coverage to the policyholders of WYO companies. 44 C.F.R. § 62.23 (2009). Nationwide, through its Nationwide Flood Service Director, has promoted the sale of flood insurance policies by its agents only via "tips" or "suggestions;" the Director has no supervisory or managerial oversight of the actions of the company's agents in the promotion or selling of flood policies. R. V. 5 at 706 (Depo. Kevin Lepionka 51:25-52:3 (Mar. 26, 2008)).[5] One such tip, entitled "Easy Steps to Begin Writing Nationwide Flood Insurance," states:

> Writing flood insurance protects your clients' financial interests, increases your income, eliminates an E&O exposure, and is quick and easy;
>
> * * *
>
> You can't sell a flood policy if you don't offer it to a client. Inform all homeowner clients that the homeowner policy doesn't cover flood loss, and explain the benefits & availability of flood insurance.

R. V. 5 at 705 (Depo. Kevin Lepionka 49:7-13 (Mar. 26, 2008)); R. V. 5 at 738 (Depo. Kevin Lepionka Exhibit 4 (Mar. 26, 2008)). Another such tip entitled "Flood Sales and Marketing Tips," states,

> Offer flood insurance to all clients, especially with homeowner quotes and applications. Don't wait for your client to tell you that they need a flood policy.

R. V. 5 at 701 (Depo. Kevin Lepionka 31:3-8 (Mar. 26, 2008)); R. V. 5 at 715 (Depo. Kevin Lepionka Exhibit 2 (Mar. 26, 2008)).

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[5]The transcript of Kevin Lepionka's deposition was not copied separately in the appellate record because of the Nationwide Parties' erroneous assertion that it had not been part of the trial court record. In fact, the deposition had been made a part of the trial court record as Exhibit "C" to Plaintiffs' Motion to Compel filed on September 15, 2008, which has been included as part of the appellate record. Consequently, the citation to Kevin Lepionka's deposition is made to where that Motion to Compel appears in the appellate record.

In spite of Nationwide's promoting the sale of flood insurance policies by its agents to its policyholders, Schmidt admitted he did not offer a flood policy to John, and "they did not routinely offer flood policies before Hurricane." Depo. Richard Schmidt 84:8-85:4 (Jan. 11, 2008); R. V. 14 at 2100-V. 15 at 2101-02. This admission is even more significant in light of Schmidt's testimony regarding the Mladineos' Ocean Spring's home: "Looking at the house being on the water [I] would assume that it is in the flood zone." Depo. Richard Schmidt 82:12-13 (Jan. 11, 2008). Yet, Schmidt failed to offer John a flood policy in response to John's specific request for insurance coverage for damage from all wind and water damage from all storms. In addition, Schmidt testified he doesn't recall seeing any correspondence from Nationwide nor participating in any training sessions offered by Nationwide or FEMA, regarding the promotion, marketing or explaining the benefits and availability of flood insurance. Depo. Richard Schmidt 83:10-19, 88:14-25 (Jan. 11, 2008). Testimony from Nationwide employees failed to identify any specific individual or department with the basic responsibility for the supervision and training of Nationwide agents in Mississippi to ensure the promotion and marketing of flood insurance policies to its policyholders, contrary to Nationwide's contractual obligation to FEMA/FIA as a WYO company, and contrary to the public policy mandated by Congress. R. V. 6 at 772 (Depo. Ralph Stanfield 73:4-25 (Apr. 17, 2008)).[6] In fact, according to Dr. Tim Ryles, one of the Mladineos' experts, Nationwide's insouciant approach to marketing flood insurance along the Mississippi Coast may undermine the program's objectives. R. V. 15 at 2111-35.

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[6]The transcript of Ralph Stanfield's deposition was not copied separately in the appellate record because of the Nationwide Parties' erroneous assertion that it had not been part of the trial court record. In fact, the deposition had been made a part of the trial court record as Exhibit "E" to Plaintiffs' Motion to Compel filed on September 15, 2008, which has been included as part of the appellate record. Consequently, the citation to Ralph Stanfield's deposition is made to where that Motion to Compel appears in the appellate record.

A second consideration of public policy is that there should be a remedy for every wrong done to one by another. This public policy preference arises out of Article 3, Section 24 of the Mississippi Constitution of 1890. *See also Stokes v. Newell*, 174 Miss. 629, 165 So. 542, 545 (Miss. 1936); *Capital Elec. Power Assoc. v. Hinson*, 230 Miss. 311, 92 So. 2d 867, 871 (Miss. 1957). Similar considerations of public policy are the specifically stated legislative preferences that the conduct of both the plaintiffs as well as that of defendants be evaluated and determined on the basis of comparative fault, and that all questions of negligence and contributory negligence are for the jury to determine. Miss. Code Ann. §§ 11-7-15 and 11-7-17.

Still another expression of public policy is found within Mississippi law: If a customer requests a particular type of coverage the agent is obligated to exercise reasonable care to obtain the requested coverage. *Smith*, 2009 WL 736199 at *6. Moreover, the Mississippi Legislature has established certain duties and standards for insurance agents, through its statutory scheme requiring the initial testing for licensure and mandatory continuing education credits in order to maintain their license. Thus, the Legislature has expressed its intent that insurance agents meet certain professional standards in their dealings with the consumer, indicating that these agents bear responsibility and liability for a breach of these standards.

Nationwide itself holds out its own agents as professionals who can provide "expert advice" to its policyholders. Depo. John Mladineo 179:19-24 (Mar. 4, 2008). The position of the Trial Court renders the Legislatures' regulation and required standards and obligation of insurance agents to its customers meaningless, since their position means that the "duty to read" defense trumps any responsibility of the insurance agents for their actions or errors. If one accepts this argument, the obvious question to ask is: Why do we have insurance agents at all? Why go through the charade

of making insurance agents licensed professionals in the state of Mississippi without requiring a legal and ethical responsibility and obligation to their clients? In place of an insurance agent, an insurance company should provide an 800 number for the customer to call up and "order" his own insurance policy, thus, truly placing all responsibility on the consumer, as the Nationwide Parties argued below. However, current Mississippi law and public policy requires insurance agents, as licensed professionals, to adhere to certain standards and obligations in dealing with their clients. And these licensed professionals should bear responsibility and liability for a breach of this duty. The argument that an insurance agent should be relieved of any and all liability and responsibilities for a breach of his legal duties, simply because a non-conforming insurance policy was issued, undermines the constitutional protections that for each wrong there should be a remedy available, and is clearly against the public policy of this state.

This Court has previously interposed considerations of public policy between its citizens and judicial results that it has deemed to be unconscionable: "We hold that on the grounds of public policy defendant was estopped from cancelling the policy after the onset of Kelley's fatal illness." *Kelley*, 389 So. 2d at 922. Likewise, the public policy of this state prohibits, or should prohibit the unconscionable situation which developed in the present case. Having received a specific request for insurance coverage, Schmidt, a Mississippi licensed insurance agent, failed to have the Mladineos complete a proper application for coverage, failed to completely inspect the Mladineos' property, failed to recognize that a portion of the Mladineos' property was located in a flood zone, failed to recommend and offer the Mladineos a flood policy, sold the Mladineos a policy that provided inadequate coverage, misrepresented the terms of that coverage, and then admittedly lied about the situation. Nationwide, having full knowledge of all of Schmidt's negligent acts, found

"no agent error" after an inadequate and incomplete errors and omissions "investigation," thus, endorsing the acts of its agent. The Nationwide Parties' justification for this conduct, while misguided, is simple: although they may have engaged in grossly negligent or even wilful acts, those failures and errors do not matter, because they delivered the policy (even though totally inadequate) to the Mladineos. Under the Nationwide Parties' premise, the agent and the company were completely absolved of any liability, and the unsuspecting customer is bound by the terms of the policy immediately upon its delivery, regardless of what those terms are. Period. No qualifications. No limitations. No exceptions. As a matter of public policy, this is not and cannot be the law of the State of Mississippi.

CONCLUSION

This case is not about an action on an insurance policy, but about the numerous negligent acts of an agent in inducing the insured to purchase a policy that did not contain the coverage specifically requested by the insured, then the subsequent inadequate investigation by the insuror of the negligent acts of its agent, who it had clothed with apparent authority to bind the insuror. As discussed, there are a significant number of genuine issues of material fact that must be considered by the jury. The Nationwide Parties unreasonably delayed in bringing the "duty to read" affirmative defense before the Court, and have therefore waived that defense. Alternatively, Mississippi law does not provide that the "duty to read" and the "imputed knowledge" defenses act as a complete bar to the Mladineos' claims against Schmidt for negligent failure to procure. Rather, those concepts are to be applied by a jury in a comparative fault analysis as required by law. Likewise, the Mladineos' claim against Schmidt for negligent misrepresentation are not automatically barred by the "duty to read" defense, because the "duty to read" defense does automatically render the

Mladineos' reliance on Schmidt's representations unreasonable as a matter of law. Instead, whether the Mladineos' reliance on Schmidt's representations was reasonable is a question of fact that must be decided by a jury considering a multitude of other facts that are also in dispute.

The Mladineos' claims against Nationwide for breach of good faith and fair dealing, tortious breach of contract, bad faith and other related tort claims are not barred as a matter of law. Nationwide, in spite of a readily apparent conflict between the interests of its policyholders and its agents, voluntarily undertook to investigate the claims of agent error, creating a duty to conduct a fair, prompt and adequate investigation of those claims. Whether Nationwide breached its duty to conduct a fair, prompt and adequate investigation of those claims is question to be decided by the trier of fact. Furthermore, Mississippi law recognizes that Nationwide can be contractually liable for the policy as represented by Schmidt acting with apparent authority if those representations were reasonably relied upon by the Mladineos. The "duty to read" does not make the Mladineos' reliance unreasonable as a matter of law. To the contrary, whether Schmidt was acting with apparent authority and whether the Mladineos reasonably relied on his misrepresentations are issues to be resolved by a jury. Finally, considerations of public policy prohibits the application of the "duty to read" as proposed by the Nationwide Parties. Consequently, the Nationwide Parties' Motion for Summary Judgment should have been denied, and the Trial Court's granting of that motion must be reversed.

This the 9th day of October, 2009.

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 BRIEF OF APPELLANT to the following:

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Honorable Billy Bridges
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This the 9th day of October, 2009.

CHARLES R. WILBANKS, JR.