IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2010-CA-00058

BRENDA L. MULLEN — APPELLANT

VERSUS

MISSISSIPPI FARM BUREAU CASUALTY INSURANCE COMPANY AND JOHN DOES 1-10 — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF
TIPPAH COUNTY, MISSISSIPPI

BRIEF FOR APPELLEE
MISSISSIPPI FARM BUREAU CASUALTY INSURANCE COMPANY

ORAL ARGUMENT REQUESTED

SUBMITTED BY:

JAMES R. MOORE, JR. (MSB [redacted])
JANET G. ARNOLD (MSB [redacted])
MICHAEL C. GATLING (MSB [redacted])
COPELAND, COOK, TAYLOR & BUSH, P.A.
600 Concourse, Suite 100
1076 Highland Colony Parkway (39157)
Post Office Box 6020
Ridgeland, Mississippi 39158
Telephone: 601.856.7200
Facsimile: 601.856.7626

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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 Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Circuit Court Judge:

Honorable Andrew K. Howorth

Parties:

Brenda L. Mullen, Plaintiff/Appellant

Mississippi Farm Bureau Casualty Insurance Company, Defendant/Appellee

Counsel:

Clyde H. Gunn, III; Christopher Van Cleave; W. Corban Gunn; David N. Harris, Jr.; Corban, Gunn & Van Cleave, PLLC, Biloxi, Mississippi, Counsel for Brenda L. Mullen

A. Norris Hopkins, Jr., Hopkins, Barvie & Hopkins, PLLC, Gulfport, Mississippi, Counsel for Brenda L. Mullen

James R. Moore, Jr.; Janet G. Arnold; Michael C. Gatling, Copeland, Cook, Taylor & Bush,

P.A., Ridgeland, Mississippi, Counsel for Mississippi Farm Bureau Casualty Insurance Company

Other:

Gene Mullen, husband of Plaintiff/Appellant

Respectfully submitted this 31st day of March, 2011.

JAMES R. MOORE, JR. (MSB [redacted]
JANET G. ARNOLD (MSB [redacted]
MICHAEL C. GATLING (MSB [redacted]
Counsel of Record for Defendant/Appellee Mississippi Farm Bureau Casualty Insurance Company

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STATEMENT OF ISSUES

1. Does the trial court's adoption, in majority, of the proposed findings and conclusions submitted to it by Mississippi Farm Bureau Casualty Insurance Company ("Farm Bureau") change this Court's *de novo* standard of review regarding summary judgments?

2. Did the trial court properly grant summary judgment for Farm Bureau based on the uncontradicted fact that Brenda L. Mullen refused to appear for an examination under oath or produce requested financial records following a fire loss?

3. Did the trial court correctly treat Farm Bureau's request for a single examination under oath and a single production of financial records as being reasonable as a matter of law?

4. Did the trial court properly hold that Farm Bureau was not required to accuse Mrs. Mullen of arson or demonstrate evidence of incendiary origin as a predicate to Farm Bureau's request for an examination under oath and production of financial records?

5. Did the trial court correctly follow this Court's long-standing jurisprudence on forfeiture of insurance coverage in holding that Farm Bureau was not required to demonstrate that Mrs. Mullen's refusal to sit for an exam under oath or provide requested financial records caused it prejudice?

6. Did the trial court properly hold that Mississippi law and the unambiguous language of Farm Bureau's dwelling package policy issued to Mrs. Mullen did not require Farm Bureau to pay Mrs. Mullen's claim within 60 days of receipt of her proof of loss, regardless of the status of Farm Bureau's investigation of the loss?

REQUEST FOR ORAL ARGUMENT

This appeal presents several legal issues that are now well-settled concerning summary judgment. The legal issues concerning an insured's duty to comply with a request for an

examination under oath and to produce requested financial records following a fire loss are also well-settled in Mississippi. Although most of the issues presented on this appeal are not novel, oral argument may be of assistance to the Court in understanding the uncontradicted material facts of the case. Therefore, Farm Bureau requests that the Court grant oral argument.

INTRODUCTION

The Brief for Appellant, Brenda L. Mullen, presents numerous mischaracterizations of the record before this Court. They are all presented with one design – to distract from the primary uncontradicted, material and salient point in this case. Following a fire loss at a house she owned in Falkner, Mississippi, Mrs. Mullen refused Farm Bureau's request that she sit for an examination under oath. She also refused to produce financial records requested by Farm Bureau. The refusals were in direct violation of the clear and unambiguous terms of the dwelling package policy issued by Farm Bureau to Mrs. Mullen concerning the house that burned. Under Mississippi law, although Mrs. Mullen gave two tape-recorded statements to adjusters following the fire loss, those recorded statements (which were clearly, on their face, not under oath) were not the equivalent of an examination under oath. As a matter of law, one request for one examination under oath is reasonable. Farm Bureau's single request for production of Mrs. Mullen's material financial records following the fire loss was also reasonable as a matter of law.

Mrs. Mullen's suggestion on this appeal that she did provide an examination under oath and that Farm Bureau somehow spoliated it – removing the oath-taking portion of the statement, as well as removing or withholding some supposed signature page – is totally unsupported by anything in the record. It is a suggestion never made by Mrs. Mullen in the trial court and a suggestion that should not be countenanced by this Court.

This Court has clearly held that litigants cannot manufacture issues of fact to avoid summary

judgment where no such issues actually exist. Though Mrs. Mullen has attempted to manufacture numerous fact issues, the Circuit Court Judge properly cut through that to the heart of this case and to what is genuine and uncontradicted – Mrs. Mullen refused to comply with the clear conditions of her Farm Bureau dwelling package policy following a fire loss. She refused to provide an examination under oath and provide requested financial records. She never retracted that refusal and never offered to sit for an exam or produce the requested financial records. Judge Howorth's ruling comports exactly with this Court's prior jurisprudence, i.e., that such conduct by an insured forfeits the insured's rights and voids coverage under her policy as a matter of law. The summary judgment issued by the Circuit Court of Tippah County in favor of Farm Bureau should be affirmed.

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition Below

On September 11, 2008 Farm Bureau denied Brenda L. Mullen's claim, made after a fire loss, when she refused to accede to Farm Bureau's request for an examination under oath and to produce certain financial records. Although Mrs. Mullen was given time to retract her refusal, she did not. Instead, she sued Farm Bureau on November 10, 2008, alleging breach of contract and bad faith. (RV1 at 1-13.)

Farm Bureau answered Mrs. Mullen's complaint on December 19, 2008, and also filed a counterclaim for declaratory judgment that it owed Mrs. Mullen nothing because of her violation of the provisions of her dwelling package policy insuring the house that burned. (RV1 at 18-74.) On January 20, 2009 Mrs. Mullen answered Farm Bureau's declaratory judgment counterclaim, denying that she breached the insurance policy. (RV1 at 75-115.) Referenced in that answer and attached to it as Exhibit A was a copy of the unsworn recorded statement that Mrs. Mullen gave to a Farm Bureau adjuster on April 17, 2008. (RV1 at 76, 81-112.)

After Mrs. Mullen served her initial discovery requests, Farm Bureau moved for a protective order. The interrogatories served far exceeded the scope and number allowed under the Mississippi Rules of Civil Procedure. (RV2 at 131-157.) On May 4, 2009 Farm Bureau also filed a motion for summary judgment. Farm Bureau asserted Mrs. Mullen breached her dwelling package policy and voided her insurance coverage when she refused to schedule an examination under oath and produce financial records as requested by Farm Bureau. (RV2 at 169-257.)

The parties entered into an agreed order on May 25, 2009 under which Mrs. Mullen's counsel agreed to withdraw her original discovery requests and serve revised requests in compliance with the Rules. (RV2 at 266.) Mrs. Mullen then served revised requests, which Farm Bureau answered on June 5, 2009 subject to a second motion for protective order. The second motion asserted both that Mrs. Mullen's requests again exceeded the scope of the Rules and that the requests sought material irrelevant to the issues in the case, as Farm Bureau had not accused Mrs. Mullen of arson. Rather, Farm Bureau denied the claim because Mrs. Mullen refused to submit to an exam under oath and produce financial records as required by her policy, impairing Farm Bureau's investigation. (RV2 at 270-72; RV3 at 273-422; RV4 at 423-81.)

On May 4, 2009 Farm Bureau served Mrs. Mullen's counsel with an executed and sworn copy of the affidavit of Chris Deaton, submitted in support of Farm Bureau's motion for summary judgment. (RV6 at 782, 785-87, 788.)[1] The trial court heard Farm Bureau's motion for summary judgment on October 14, 2009. (RV6 at 781; RV11 at 1.) Following the hearing and before entry

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[1] The suggestion runs throughout Mrs. Mullen's Brief for Appellant that the trial court improperly granted summary judgment for Farm Bureau based on an unsworn, unsigned affidavit by attorney Chris Deaton, who acted as Farm Bureau's counsel in regard to the request for an exam under oath and production of financial records. That suggestion is untrue. The affidavit was executed under oath on May 1, 2009 and was provided to Mrs. Mullen's counsel over five months before the hearing on the motion for summary judgment.

of the trial court's ruling, Farm Bureau filed the original executed and sworn affidavit of Chris Deaton in the court file, in substitution for the unsigned version filed originally. (RV6 at 782-88.) At the trial judge's request, both parties submitted proposed findings and conclusions. (RV11 at 46.) The trial court granted summary judgment in favor of Farm Bureau on December 8, 2009, dismissing Mrs. Mullen's claims and granting Farm Bureau's counterclaim for declaratory judgment. (RV6 at 799-816, 817.) Mrs. Mullen noticed her appeal on January 6, 2010. (RV6 at 818-19.)

II. Statement of Facts

The following facts are uncontradicted in the record concerning this case.

A. The Mullens' Falkner, Mississippi, House and Access to It

As of Monday, March 31, 2008, Brenda L. Mullen owned a house located at 540 County Road 320 in Falkner, Mississippi. (RV2 at 178.) At the time, Brenda Mullen and her husband, Gene Mullen, lived in a different house located in Walnut, Mississippi. (RE at 30; RV4 at 509.) Their adult daughter, Andrea, lived with them. (RE at 55; RV4 at 520.) The Falkner, Mississippi, house in which the Mullens formerly lived was titled in Brenda Mullen's name, as was a dirt-moving and construction business operated by the Mullens – A&B Dirt Moving, LLC. (RE at 56, 89; RV4 at 521, 554.)[2] The Falkner house was used as occasional housing for workers employed in the Mullens' business. There was one worker named Joe Williamson who often lived in his camper and parked it next to the house. Mr. Williamson was allowed to wash his laundry in the house and use the refrigerator. (RE 42-44; RV4 at 502-05.) Every door on the house had a deadbolt lock, and there only four keys. The persons with keys were Brenda Mullen, Gene Mullen, their daughter Andrea,

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2 The business was held in Brenda's name in order that it could be classified as minority-owned. (RE at 56; RV4 at 521.)

and Mr. Williamson. (RE 32, 44, 47, 62, 99; RV4 at 504, 507, 511, 527, 564.)

B. The Farm Bureau Dwelling Package Policy Concerning the Falkner House

Farm Bureau insured the Falkner house under dwelling package policy number DPC19148, with Brenda Mullen as the only named insured. (Farm Bureau Record Excerpts ("FBRE") Tab 1; RV2 at 177-213.) That policy contained the following relevant provisions:

Comprehensive Dwelling Package Policy
(Standard)

AGREEMENT

> We will provide the insurance described in this policy in return for the premium and compliance with all applicable provisions of this policy.

(FBRE Tab 1 at 187; RV2 at 187.)

Section I - CONDITIONS

> **2.** **Your Duties After Loss.** In case of a loss to covered property, you must see that the following are done:
> . . . .
>
> **f.** As often as we reasonably require:
> . . . .
>
> **(2)** Provide us with records and documents we request and permit us to make copies; and
>
> **(3)** Submit to examination under oath, while not in the presence of any other "insured," and sign the same.
> . . . .
>
> **8.** **Suit Against Us.** No action can be brought unless the policy provisions have been complied with . . . .

(FBRE Tab 1 at 197; RV2 at 197.)

Section I and II Conditions

. . . .

2. **Concealment, Misrepresentation or Fraud.** This policy is void in any case of fraud by you as it relates to the policy at any time. It is also void if any "insured" intentionally conceals or misrepresents a material fact concerning:

   a. This policy; or

   b. A claim under this policy.

(FBRE Tab 1 at 209; RV2 at 209.)

C. The Fire Loss at the Falkner House

A fire occurred at the Falkner house on Monday morning, March 31, 2008. (RE at 24; RV4 at 496.) Joe Williamson was not present, as he had left the premises for a few days on Saturday, March 29. (RE at 44, 65; RV4 at 504, 530.) The Falkner Volunteer Fire Department responded to a call about the fire. All the doors to the house were locked when the firemen arrived, and all the windows were also locked. The firemen broke in the doors of the house to enter it to fight the fire, which had started in the area of the house behind the furnace. (RV5 at 579-82.) The master bathroom closet was directly behind the furnace. (RV5 at 581-82.)

The volunteer fire chief, Petie Rutherford, submitted a report on March 31 indicating the fire was caused by a short in the heating unit. (RE at 24; RV4 at 496.) However, the department's fire investigator was not present that day and did not look at the scene to determine how the fire originated. (RV5 at 582.) Chief Rutherford called Gene Mullen's cell phone to inform him of the fire and left a voice message when Mullen did not answer. (RV5 at 582.)

D. Farm Bureau Begins Its Investigation Concerning Brenda Mullen's Fire Loss Claim

On April 3, 2008, Brenda Mullen submitted a sworn proof of loss to Farm Bureau and signed an authorization for Farm Bureau to enter the premises at the Falkner house and take samples as part

of Farm Bureau's cause and origin investigation. She stated in the sworn proof of loss that she did not set the fire or cause it to be set. (RE at 37-38, 40; RV4 at 498-99, 500.) Mrs. Mullen signed a release for Farm Bureau to obtain financial information. No listing of financial accounts was provided with the release at that time. (RE at 39; RV4 at 497.) On April 8, Mrs. Mullen provided Farm Bureau with a list of personal property that was in the house when the fire occurred. (RE at 52-53; RV4 at 517-18.)

Both Gene and Brenda Mullen gave a Farm Bureau adjuster recorded statements on April 3, 2008. (RE at 30-36, 41-48; RV4 at 501-15.) They stated they had not previously had any electrical problems at the house or any problems with the heating unit. A propane tank that was previously at the house had been removed, and there was no gas supplied to the single gas heater inside the house. (RE at 32, 45, 47; RV4 at 505, 507, 511.) These statements, on their face, show that they were merely taken by an adjuster with a tape recorder and were not under oath. (RE at 30-36, 41-48; RV4 at 501-15.)

Farm Bureau later requested further recorded statements from Brenda Mullen and her husband, Gene Mullen. The Mullens provided those recorded statements to Farm Bureau outside each others' presence on April 17, 2008. (RE at 54-112; RV4 at 519-72; RV5 at 573-77.)[3] The transcripts of these statements, on their face, demonstrate clearly that they were taken by an adjuster with a tape recorder and were not under oath. *Id.* Information provided by the Mullens in their recorded statements given outside each other's presence was not consistent. It revealed potential financial pressures, as well as previous losses.

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Copies of the April 3 and April 17 recorded statements were submitted by Mrs. Mullen's counsel in opposition to Farm Bureau's motion for summary judgment. (RV4 at 501-15, 519-72; RV5 at 573-77.) These are the recorded statements that Mrs. Mullen claims satisfied her obligations under her dwelling package policy.

Brenda Mullen's account of activities on the morning of the fire differed from Gene Mullen's account. Mrs. Mullen stated she got out of bed about 6:40 a.m. on the morning of the fire. Gene Mullen remained in bed and got up a little after she did, after which Mrs. Mullen and her daughter left at 8:30 a.m. to go to Corinth, Mississippi, where Mrs. Mullen had an appointment for rehabilitation following heart surgery. She stated Mr. Mullen was on the way to the shower when they left. (RE at 60-62; RV4 at 525-27.) On the other hand, Mr. Mullen stated that, on the morning of the fire, he got of bed at 4:00 a.m. (before anyone else in the household) but watched T.V. and did not go anywhere. He went to the shower when his wife left about 8:30 a.m.[4] After getting out of the shower, he noticed a missed call on his cell phone, checked it, and found that it was the call from Chief Rutherford to tell him about the fire at the Falkner house. He went to the house in Falkner, arriving after the firemen had departed. (RE at 95, 98; RV4 at 560-63.)

The Mullens stated that no flammable liquids were stored in the master bedroom, master bathroom or master bathroom closet. There may, however, have been charcoal lighter fluid stored in the utility room of the house. (RE at 63-64, 100; RV4 at 528-29, 65.)

The Mullens had a previous fire loss to another house, which had been insured by State Farm. Mrs. Mullen stated that, after the fire, State Farm no longer wanted dealings with them. She did not know why, although she speculated it had to with their making a claim. A year before the Falkner house fire, a truck was stolen from Mr. Mullen and never found. (RE at 68-70, 72; RV4 at 533-35, 537.)

Brenda Mullen informed Farm Bureau that the Falkner house had a judgment lien against it

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Chief Rutherford's written report showed that the firemen were dispatched to the fire at 8:21 a.m., arrived at 8:23 a.m., and left the Falkner house at 9:41 a.m. (RE at 24; RV4 at 496.)

resulting from a dispute over an automobile title. She stated it would have to be paid if the house were sold. (RE at 78-79; RV4 at 543-44.) Mr. Mullen stated that they had no tax liens and had not been sued. RE at 106-07; RV4 at 571-72.) The Falkner house was not formally on the market for sale. The Mullens had, however, offered to sell it to people who had inquired about it. No one had agreed to the price they quoted for the house, as Mr. Mullen wanted cash and would not finance the quoted price. (RE at 101-02; RV4 at 566-67.)

Mrs. Mullen underwent open heart surgery in January 2008, and Mr. Mullen was under treatment for prostate cancer. The Mullens had no health insurance coverage. Mrs. Mullen stated that she had no medical bills for her surgery, claiming the hospital wrote them off. By contrast, Mr. Mullen stated that they did owe medical bills for his wife's surgery but they were going to arrange to make payments. He stated that the bills for his prostate treatment were taken care of. (RE at 60, 80-81, 108-09; RV4 526, 545-56; RV5 at 573-74.)

The Mullens handled their personal finances through the family business. When they needed personal funds, they withdrew them from the business. (RE at 57, 110; RV4 at 522; RV5 at 575.) The Falkner property was mortgaged with First South Bank, and the house the Mullens lived in at Walnut was mortgaged with Countrywide. In their recorded statements, the Mullens did not provide any loan or account numbers or addresses at which payments were made, and they gave only estimated amounts of the outstanding balances and monthly payments. The payment due on the Falkner house on April 12 after the fire had not been made. (RE at 31, 43, 58; RV4 at 503, 510, 523.)

The Mullens had a checking account at Regions Bank. No account number was given during the recorded statement. They had no savings account. (RE at 72; RV4 at 537.) The Mullens also had a Visa and a Sears Mastercard. No account number or address information was given during the

recorded statement regarding either credit card, and no issuing bank information was given for the Visa. Mrs. Mullen, who handled the family finances, stated that the balances were paid off each month. (RE at 75-76; RV4 at 540-41.)

The family's dirt moving business had heavy equipment that the Mullens financed with John Deere. No exact loan balance or account number information was provided at the time of the recorded statements. (RE at 76-78; RV4 at 541-43.) The Mullens also had several vehicles and a camper. All but the camper were financed through entities such as GMAC, Trustmark, Ford Motor Credit, and Automobile Financing, but no loan or account numbers were provided at the time of the recorded statement. The name of the lender for the camper was not provided. (RE at 72-75; RV4 at 537-40.)

E. Farm Bureau Makes Its Request for Financial Records and for an Examination of Mrs. Mullen Under Oath

Farm Bureau determined that its investigation required an examination under oath of Mrs. Mullen, as well as a production of documentation concerning financial records. Attorney Chris Deaton was hired by Farm Bureau to handle that matter. (FBRE Tab 2 at 787; RV2 at 221; RV6 at 782, 785.) On May 29, 2008, Deaton wrote to Mrs. Mullen. (RE at 128-30; RV2 at 214-16.) He requested that she contact him to arrange a day and time that she could appear for an examination under oath. Deaton requested that she bring with her cellular and any other telephone records for the week before the fire through the day after the fire. He also requested that she produce various financial records. The requested financial records included tax returns and W-2's for 2006 and 2007; information concerning all personal and business loans made or applied for during the 12 months previous to the fire; a list of all credit cards (personal and business) with account numbers in use from April 1, 2007 forward; all personal and business checking account records from April 1, 2007

forward; a copy of any bankruptcy petitions ever filed or, alternatively, information about the location of any court where such a petition had been filed; documentation concerning any notes, mortgages and liens regarding the Falkner house; an inventory of personal property at the house and any receipts regarding that personal property. Deaton's letter provided his office's phone number. He asked Mrs. Mullen to contact him within the next 2 weeks to schedule her examination under oath. The letter informed her that unexcused failure to comply with Farm Bureau's request would be a breach of her insurance policy. (RE at 128-30; RV2 at 214-16.)

Deaton's office received a phone call on June 8, 2008 from someone who identified himself as Gene Mullen. The person informed Deaton's secretary that Farm Bureau did not have a right to the documents requested in Deaton's May 29 letter and asked why Farm Bureau needed personal information about Mrs. Mullen. The caller indicated Mrs. Mullen would obtain an attorney. (FBRE Tab 2 at 787; RV2 at 223; RV6 at 787.)

On June 13, Deaton wrote another letter to Mrs. Mullen, explaining her legal duties under her Farm Bureau dwelling package policy concerning an exam under oath and production of financial records. Deaton cited the relevant case law to Mrs. Mullen concerning these issues. He asked that she have her attorney contact him to arrange for the exam under oath. (FBRE Tab 2 at 786; FBRE Tab 3 at 217-18; RV2 at 217-18, 222.)

F. Deaton's Correspondence With Mrs. Mullen's Attorney, Norris Hopkins

Mrs. Mullen retained attorney A. Norris Hopkins, Jr., to represent her and, on June 30, 2008, Deaton received a letter written by Mr. Hopkins and dated June 24. For the Court's convenience, the pertinent part of the letter is quoted in full, below.

> Please be advised that this firm has been retained to represent the Mullen's regarding this requested statement under oath by Farm Bureau. First and foremost, please provide me with a copy of the

> policy language that allows for Farm Bureau to violate the Mullens' privacy, and furthermore, provide me with authority which allows Mississippi Farm Bureau to get three sworn statements from their insureds. Furthermore, please provide legal authority which would allow Farm Bureau, under the policy language, to be able to request information such as tax returns, credit card statements, applications for business and personal loans, personal and business checking accounts, phone records, and bankruptcy petitions.
>
> It appears that Farm Bureau is in bad faith denying this claim and requesting information in violation of the Mullens' privacy rights. The Mullens have complied with the policy language and have given not only one, but two statements already, and it has been over three months since the date of this loss. We hereby call upon Farm Bureau to comply with the Contract of insurance with the Mullens and pay for their loss under the policy under five (5) days from the date of this correspondence.
>
> Certainly the Mullens will continue in good faith to cooperate with Farm Bureau, however, this intentional violation of the privacy rights and demands that far exceed what is required under the policy will not be tolerated. Please provide me with a copy of the transcript of both statements under oath that have already been taken by Farm Bureau. If after you provide all the information requested, we determine that indeed Farm Bureau has a right under the policy to move forward with the third statement, then we will be happy to arrange same.

(RE at 131-32; RV2 at 219-20.)

Deaton then wrote to Hopkins on July 2 at Hopkins' regular office address. Deaton advised Hopkins that neither of the Mullens had previously given any examination under oath. He enclosed a copy of the previous recorded statements and a copy of the Farm Bureau policy. Deaton again asked for potential dates for the requested examination under oath. (FBRE Tab 4; RV2 at 222, 224-25; RV6 at 786.)

Mr. Hopkins maintains he did not receive Deaton's July 2 letter, although he acknowledges there is no error in the address. (RV5 at 596, 610.) Mr. Hopkins also maintains that Farm Bureau did not provide him with copies of Mrs. Mullen's recorded statements until June 5, 2009, when it

produced a copy of them in discovery in this case. (RV5 at 596, ¶5.) However, the court's own record reflects that Mr. Hopkins did, in fact, receive and possess a copy of Mrs. Mullen's April 17, 2008 recorded statement. On January 20, 2009 (prior to discovery in this action), Mr. Hopkins attached a copy of that April 17, 2008 recorded statement as an exhibit to Mrs. Mullen's answer to Farm Bureau's declaratory complaint in this case. Her answer directly references that statement as exhibit "A." (*Compare* Bates numbered copy of statement produced by Farm Bureau in discovery in June 2009 at RE 54-85, RV4 at 519-50 *with* unnumbered pre-suit copy attached to and referenced in Mrs. Mullen's answer to declaratory complaint at RV 1 at 76, 81-112).

Deaton received no response from Hopkins to the July 2 letter. Therefore, Deaton wrote to Hopkins again on August 6, 2008. Deaton again asked for dates for the examination under oath. He advised Hopkins that Farm Bureau would close its file within two weeks if it had not heard from Hopkins. The letter was sent to Hopkins' regular office address. (FBRE TAb 5; RV2 at 222, 226; RV6 at 786.) Hopkins states he did not receive this letter, either, although he admits its was addressed correctly. (RV5 at 596, 610.)

Deaton received no response to the August 6 letter. After allowing over one month for a response, Deaton wrote to Mrs. Mullen on September 11, 2008 in care of Mr. Hopkins at his regular office address to inform her that Farm Bureau denied her claim because she failed to comply with the policy provisions concerning submission to an examination under oath and provision of financial information as requested by Farm Bureau. All of Deaton's prior correspondence to Mrs. Mullen and attorney Hopkins was cited by date, and Deaton confirmed the complete failure to respond to Farm Bureau's requests for dates on which Mrs. Mullen could make herself available to provide an examination under oath. The applicable law requiring submission to such an exam was cited. Finally, Deaton gave Mrs. Mullen one more chance. He asked that she notify him right away if she

had information that was new or contrary to what was set out in his letter. In that event, Farm Bureau would reevaluate its position. RE at 133-34; RV2 at 221, 228-29; RV6 at 786.)

Mr. Hopkins received the September 11, 2008 letter, as he then sent correspondence to Chris Deaton dated September 19, 2008. (RE at 135-36; RV2 at 221, 230-31; RV6 at 786.) Once again, there was no offer of potential dates on which Mrs. Mullen could be available to sit for an examination under oath. Instead, the letter claimed that the prior recorded statements satisfied Mrs. Mullen's obligation under the Farm Bureau policy. For the Court's convenience, Mr. Hopkins' September 19, 2008 letter is quoted below:

> As you are aware, I represent the Mullens in the above referenced matter. This fact I advised you of on or about June 24, 2008. I am in receipt of your September 11, 2008, correspondence to my client, Brenda Mullen, advising of Farm Bgureau's denial of their claim. Furthermore, you advised that Farm Bureau has attempted to contact my client on four (4) occasions between May and August of 2008. This latest correspondence the one and only time I have been contacted by anyone on behalf of Farm Bureau regarding my client's claim to include a request to conduct an examination under oath of my clients. Additionally, my clients advised that have not been contacted not requested to submit to an examination under oath since the time of my representation. Clearly, any attempt to do so would be in violation of Mississippi Law and the Rules of Professional Conduct. As such, I would request any and all correspondence and phone logs wherein you requested that my client submit to an examination under oath on the dates of July 2, 2008, and August 6, 2008.
>
> As I have stated in my June 24, 2008, correspondence, my clients are willing to cooperate with Farm Bureau in their claim. They remain willing to cooperate with Farm Bureau during the investigation of their claim. As you are aware, the Mullens have provided more than one statement to representativies of Farm Bureau regarding their claim. ***Whether these were sworn or not sworn***, it was the understanding of my clients that they have given the statements requested by Farm Bureau regarding their claim that ther are required to do under the policy. As a matter of fact, they submitted more than one of these statements to assist Farm Bureau in evaluating their claim. At this time, I do not have the benefit of having all of these

> statements for which I have made the request to you on June 24, 2008. Regardless, my clients have no intention of not abiding by the terms of their contract nor have they at any time. They have made themselves available for statements on more than one occasion prior to my representation.
>
> If you wish to discuss these matters with me, please feel free to contact me at the above phone number. If I do not hear from within seven (7) days of this correspondence, I will assume that your coverage opinion that "Coverage is voided for all claims" remains and will proceed accordingly.

(RE at 135-36; RV2 at 230-31.) (emphasis added).

Deaton then wrote to Hopkins yet again on September 22, 2008, enclosing for Hopkins' review a copy of his letters of May 29, June 13, July 2 and August 6. He informed Hopkins that he had transmitted Hopkins' letter to Farm Bureau. RE at 137; RV5 at 608.) Deaton again heard nothing further from Hopkins. No offer for Mrs. Mullen to submit to an examination under oath or produce financial records was forthcoming. This was despite that, without question, Mrs. Mullen's counsel had all of the requests for same in hand at that time. Deaton then wrote to Hopkins on September 29, 2008 and asked if it was Hopkins' position that he did not receive either the July 2 letter or the August 6 letter. RE at 138; RV5 at 609.) Hopkins wrote back on October 1, 2008 affirming this was his position but noting that the letters were, in fact, directed to the correct address. Once again, there was no offer of potential dates for Mrs. Mullen to submit to an examination under oath or produce financial records. (RE at 139; RV5 at 610.)

On October 3, 2008, Deaton wrote to Hopkins one final time, letting Hopkins know that his letter of October 1 had been forwarded to Farm Bureau. (RE at 140; RV5 at 611.) On November 10, 2008 Mrs. Mullen sued Farm Bureau claiming that it had violated her rights under the dwelling package policy concerning the Falkner house. (RV1 at 1-13.) Before filing suit, Mrs. Mullen never sat for the requested exam under oath and never offered to sit for the requested exam under oath.

She never produced the requested financial records and never offered to produce them. As of the date of the summary judgment hearing in this matter, Mrs. Mullen had not retracted her refusal. The same is true as of the date of submission of this Brief to this Court.

G. The Incendiary Origin of the Fire

Farm Bureau's policy language contains nothing whatsoever limiting requests for examinations under oath to situations where there is evidence that a fire is incendiary. (FBRE Tab 1 at 197; RV2 at 197.) When Farm Bureau moved for summary judgment in this matter, it therefore did not rely on any evidence of whether the fire in question was, or was not, incendiary. (RV2 at 173-74.) However, Farm Bureau clearly provided Mrs. Mullen notice that it possessed evidence that the fire was incendiary when it filed its answer and counterclaim for declaratory judgment. (RV1 at 18-37; RV2 at 170.) Farm Bureau also produced photographs of the sample cans taken from the Falkner house during its cause and origin investigation. (RV11 at 4.)

Farm Bureau moved for a protective order during discovery regarding any matters not salient to the reason for the denial of Mrs. Mullen's claim – i.e., Mrs. Mullen's refusal to provide an exam under oath and produce financial records. (RV3 at 273-78.) Two of the items withheld from production subject to the trial court's consideration of that motion for protective order were Farm Bureau's cause and origin materials concerning the evidence of incendiary origin and location of heavy petroleum distillates at the fire's starting point in the master bathroom closet. Farm Bureau had not accused Mrs. Mullen of arson and, in fact, could not reach a decision on whether she had anything to do with the fire, given her refusal to allow Farm Bureau to complete its investigation via the examination under oath and production of financial records. (RV11 at 4, 7-8.)

In response to Farm Bureau's motion for summary judgment, Mrs. Mullen's counsel represented to the trial court that there was no evidence whatsoever of incendiary origin regarding

the fire (RV4 at 489-90) and took the position that such evidence was a necessary prerequisite to a request for an examination under oath and production of financial records. At the summary judgment hearing, Farm Bureau correctly took the position that evidence of incendiary origin was not required as a prerequisite to its request for an exam under oath and production of financial information. However, in rebuttal to a representation to the trial court that was simply not true, Farm Bureau's counsel offered the cause and origin investigation information. (RV11 at 21.) That information showed the following.

Farm Bureau's Certified Fire Examiner, Dennis Welch, examined the scene on April 4, 2008. He determined the fire started in the master bathroom closet. There was no natural source for ignition in the closet. Debris in the closet had an odor of possible ignitible liquid. He took samples from three areas in the closet and submitted them to an independent lab which, on April 10, issued a report that all of the samples were positive for evaporated heavy petroleum distillates. Evaporated heavy petroleum distillates include liquids such as charcoal starter, lamp oils, paint thinners, stain thinners, solvents, kerosene, and diesel fuel. On May 14, 2008 Dennis Welch submitted a report to Farm Bureau concluding that, based on his investigation, the fire was incendiary. (RV6 at 782, 789-98.)

Mrs. Mullen's counsel objected to the offering of the cause and origin report materials, and the trial court reserved its ruling on whether they would be considered. (RV2 at 22-23.) Although the trial court did note these materials in its opinion, it also clearly noted that they were not necessary to its opinion granting summary judgment to Farm Bureau. (Re at 7-8; RV6 at 801-0-2.) The Farm Bureau policy in question does not contain any prerequisite that such evidence exist before Farm Bureau can request an examination under oath or production of financial records in the course of its investigation of a fire loss. (FBRE Tab 1 at 197; RV2 at 197.) As demonstrated below, Mississippi

law does not contain any such prerequisite, either.

SUMMARY OF THE ARGUMENT

Grants of summary judgment are reviewed *de novo* using the same standard applied by the trial court. This is the highest appellate standard of review. There is no basis for Mrs. Mullen's argument that a higher standard of review should apply. This Court recently rejected application of any heightened standard of review simply because a trial court judge adopts in large part a proposed opinion submitted by one of the parties. The record in this case shows that the trial court did review the materials submitted by the parties at the summary judgment stage and did not in any respect abandon the judicial function.

Judge Howorth properly granted summary judgment in favor of Farm Bureau. Farm Bureau's policy issued to Mrs. Mullen clearly requires that she submit to an examination under oath and produce financial records after a loss as often as Farm Bureau reasonably requires. This Court has recognized that one request for one examination under oath and production of financial records is reasonable as a matter of law. This is true even if an insured has previously given several other statements that were unsworn. Unsworn statements, recorded or otherwise, are simply not the equivalent of an examination under oath by counsel. Oral statements and estimates concerning an insured's financial condition are not the same as provision of documentary evidence. For that reason, Mississippi law provides that an insurer can request documentation of an insured's financial condition as part of its investigation if the language of the insured's policy so provides.

The Circuit Judge properly held, as a matter of law, that Mrs. Mullen, through her counsel, refused Farm Bureau's request that she submit to an examination under oath concerning her fire loss and that she produce financial records. The letters from Mrs. Mullen's counsel can be interpreted no other way. The letters stated the position that Mrs. Mullen's prior unsworn recorded statements

were sufficient to comply with the policy, as well as the position that Farm Bureau's request for financial information constituted a bad faith invasion of privacy. Although an initial refusal to submit to an exam under oath and produce financial records can be cured by an insured's retraction of the refusal within a reasonable time, there was never any retraction in this case. To this day, Mrs. Mullen has never retracted her refusal. Instead, she has chosen to defend it.

Neither Farm Bureau's policy language nor Mississippi law require that Farm Bureau must have accused Mrs. Mullen of arson before requiring an exam under oath and production of financial records. Neither Farm Bureau's policy language nor Mississippi law even require that Farm Bureau possess evidence of incendiary origin of a fire before requiring such an exam and financial record production. Farm Bureau's position regarding the validity of its request to Mrs. Mullen and her refusal to comply has been the same throughout the course of this matter. There has been no change of position by Farm Bureau, despite Mrs. Mullen's suggestion otherwise in her arguments about "mending the hold."

Although Mrs. Mullen has tried to create numerous fact issues to avoid the effect of her refusal, she has not created any genuine issues of material fact that would avoid summary judgment. The trial court simply found what facts were uncontradicted in the record of the case and made no findings of disputed facts. Mrs. Mullen's professed but erroneous belief that her previous recorded statements were under oath is not material. Her counsel clearly possessed a copy of at least her April 17, 2008 statement, and it is clear on its face that the statement was not given under oath but was simply a recorded statement taken by an adjuster. There is absolutely nothing in the record to support any suggestion that Farm Bureau spoliated Mrs. Mullen's statements by removing any portion involving oath-taking. There is nothing in the record to suggest Farm Bureau removed or withheld any signature page. No such suggestions were even advanced in the trial court.

There was no issue of material fact as to whether Farm Bureau's request for a single exam under oath and production of financial records was reasonable. As a matter of law, one such request is reasonable. Farm Bureau was not required to show that Mrs. Mullen's refusal prejudiced it. This Court has held that such refusals breach the misrepresentation and concealment clauses of insurance policies and has never required any showing of prejudice before affirming that insureds void their coverage by such refusals. A refusal to submit to an examination under oath and produce financial documentation prejudices an insurance company, per se, because it impairs the company's investigation into the loss.

The language of Mrs. Mullen's policy does not require that all claims be paid within 60 days of receipt of the insured's proof of loss, regardless of the status of Farm Bureau's investigation. Rather, the policy language provides that claims are payable within 60 days of receipt of a proof of loss **if** one of three other things has also occurred – (1) an agreement has been reached with the insured; (2) there has been a judgment; or (3) there has been an appraisal award. None of those three other things occurred in this case, and Farm Bureau did not breach the loss payment provisions of Mrs. Mullen's policy. Farm Bureau was entitled to conduct its investigation into Mrs. Mullen's fire loss. She refused to comply with Farm Bureau's request for an exam under oath and production of financial records and impaired the investigation, voiding her coverage.

ARGUMENT

I. The Standard of Review

This Court reviews grants of summary judgment *de novo* under the same standard employed by the trial court. *United States Fid. & Guar. Co. of Mississippi v. Martin*, 998 So. 2d 956, (¶12) (Miss. 2008). Pursuant to Miss. R. Civ. P. 56(c), summary judgment is proper when the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any,

show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. P. 56(c). As the trial court properly noted:

> Although the evidence is reviewed in the light most favorable to the nonmoving party, the nonmovant is required to come forward with probative evidence demonstrating that there are genuine issues of material fact for trial. *Borne v. Dunlop Tire Corp., Inc.*, 12 So. 3d 565, (¶¶11, 16) (Miss. 2009). The elements of a claim on which a party bears the burden of proof must be supported by "more than a scintilla of evidence; it must be 'evidence upon which a fair-minded jury could return a favorable verdict.'" *Id.* at ¶ 16 (quoting *Luverne v. Waldrop*, 903 So. 2d 745, 748 (¶10) (Miss. 2005)).

(RE at 14; RV6 at 808.)

"'[T]he existence of a hundred contested issues of fact will not thwart summary judgment where none of them is material.'" *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So. 2d 1205, 1214 (Miss. 1996) (quoting *Grisham v. John Q. Long V.F.W. Post*, 519 So.2d 413, 415 (Miss. 1990)). Moreover, this Court has noted that parties are not allowed to manufacture factual disputes where none actually exist in order to avoid summary judgment. *Callicut v. Professional Serv. of Potts Camp, Inc.*, 974 So. 2d 216, (¶16) (Miss. 2008). Rule 56 requires that disputes be "genuine." Miss. R. Civ. P. 56(c). Affidavits that contradict clear documentary evidence in the court record cannot be used to defeat summary judgment, as they constitute an attempt to manufacture a factual dispute. *Callicut*, 974 So. 2d at ¶16 (affidavit was not sufficient to defeat summary judgment when it contradicted both the party's prior testimony and clear documentary evidence of an agreement the party signed). *See also Archie v. State Farm Fire & Cas. Co.*, 813 F. Supp. 1208, 1212-13 (S.D. Miss. 1992) (affidavits that are "blatantly and inherently inconsistent" with clear documentary evidence should be ignored on summary judgment) [5]

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[5] This Court and the Court of Appeals have recognized in other contexts that affidavits which contradict clear documentary evidence and/or the court record are a "sham" and are to be ignored. *Cook v.*

Mrs. Mullen contends she is entitled to some form of heightened scrutiny review on this appeal because the Circuit Court, in majority, adopted the proposed findings and conclusions proffered by Farm Bureau. There are three reasons why this is incorrect. First, *de novo* review is the highest appellate scrutiny available. This Court looks at the record afresh and applies the same review that the trial court applied. *Martin*, 998 So. 2d at ¶12. Second, Mrs. Mullen's argument relies on decisions concerning the amount of deference given to findings of fact made by a trial judge based on disputed evidence after a trial. *See* Appellant's Brief at p. 21 citing *City of Jackson v. Presley*, 40 So. 3d 520 (Miss. 2010); *Joel v. Joel*, 43 So. 3d 424 (Miss. 2010); *Miss. Dept. of Wildlife, Fisheries and Parks v. Brannon*, 943 So. 2d 53 (Miss. Ct. App. 2006). That is not what occurred here. In this matter, involving a summary judgment motion, the trial judge made no findings as between disputed facts and did not weigh any evidence. Rather, the trial judge only made findings as to what facts were uncontradicted and then drew his conclusions of law based on those uncontradicted facts. Finally, this Court's recent decision in *Bluewater Logistics, LLC v. Williford*, __ So. 3d __, 2011 WL 240731, (¶32) (Miss. Jan. 27, 2011) calls into question whether any form of heightened scrutiny review is actually to be applied even in cases involving fact findings based on disputed evidence.

In this case, there is no indication whatsoever that the trial judge abandoned his judicial function. Rather, he made it clear at the hearing on the summary judgment motion that he had studied the parties' submissions. (RV11 at 2.) He engaged the parties' counsel and asked questions demonstrating an understanding of the issues. (RV11 at 2, 11, 22-23, 26-27, 45.) The trial judge

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State, 990 So. 2d 788, (¶6) (Miss. Ct. App. 2008) ("'[W]here an affidavit is overwhelmingly belied by unimpeachable documentary evidence in the record such as, for example, a transcript or written statements of the affiant to the contrary to the extent that the court can conclude that the affidavit is a sham, no hearing is required.'"); *Dickey v. State*, 662 So. 2d 1106 (Miss. 1995) (same).

simply found Farm Bureau's proposed submission to be appropriate with some revisions. The judge made those revisions on his own and then issued his opinon. There is no basis for review other than that which is the norm regarding a summary judgment.

II. Longstanding and Established Mississippi Law Concerning An Insured's Refusal to Provide an Examination Under Oath and/or to Produce Financial Records

Mississippi law has long held that insurance policy clauses requiring an insured to submit to an examination under oath are reasonable. *Allison v. State Farm Fire & Cas. Co.*, 543 So. 2d 661, 663 (Miss. 1989). This Court has recognized that, in the course of its investigation of a claim:

> an insurance company has the right to "possess itself of all knowledge, and all information as to other sources and means of knowledge, in regard to the facts, material to their rights, to enable them to decide upon their obligations, and to protect them against false claims."

Standard Ins. Co. of New York v. Anderson, 227 Miss. 397, 407, 86 So. 2d 298, 301 (Miss. 1956) (quoting *Claflin v. Commonwealth Ins. Co.*, 110 U.S. 81, 85 (1883)).

An insured's failure to comply with such a policy provision by either refusing to sit for an examination under oath or by sitting for an exam but refusing to answer material questions voids the insured's coverage under the policy. *Allison*, 543 So. 2d at 663-64 (refusal to answer questions about finances precludes coverage under policy as a matter of law; summary judgment proper for State Farm); *Taylor v. Fireman's Fund Ins. Co.*, 306 So. 2d 638, 645-46 (Miss. 1975) (insurance company was entitled to peremptory instruction where insured refused to answer material questions); *Southern Guar. Ins. Co. v. Dean*, 252 Miss. 69, 72, 76-78, 172 So. 2d 553, 554, 556-57 (Miss. 1965)(refusal to answer material questions on exam under oath concerning finances and refusal to produce material financial records voided policy coverage and forfeited insured's rights under policy; refusal violates concealment clause in policy); *Boston Ins. Co. v. Mars*, 246 Miss. 36, 41-42, 148

So. 2d 718, 719-20 (1963) (refusal to submit to exam under oath violated insurance policy and resulted in forfeiture of coverage); *Standard Ins. Co. of New York*, 227 Miss. at 409, 86 So. 2d at 302 (insured's refusal to answer material questions during exam under oath constituted violation of policy and of clause prohibiting concealment and misrepresentation; coverage voided).[6]

An insurance company also clearly has the right to request production of documentary evidence regarding an insured's finances if the policy so provides. *Monticello Ins. Co. v. Mooney*, 733 So. 2d 802, (¶24) (Miss. 1999). As this Court has noted:

> [T]he simple act of answering questions concerning her [the insured's] financial position could not provide sufficient information to make a determination as to any possible monetary motive underlying the fire. In short, the insurers were entitled to reliable documentation to support and supplement Mooney's [the insured's] answers.

Id.

An insured can cure an initial refusal to sit for an examination under oath or to provide requested financial information only by a retraction of the refusal and an offer to comply made within a reasonable time. *Home Ins. Co. v. Olmstead*, 355 So. 2d 310, 313 (Miss. 1978) (if insured cannot initially attend requested exam, insured must offer as soon as possible to submit to exam);

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Federal courts applying Mississippi law have held the same on numerous occasions. *United States Fid. & Guar. Co. v. Wigginton*, 964 F.2d 487, 490 (5th Cir. 1992) ("Mississippi law is clear that a policy is rendered void where an insured either fails to submit to an examination under oath or refuses to answer material questions during an examination under oath;" collecting numerous case at 490 n. 7); *Archie v. State Farm Fire & Cas. Co.*, 813 F. Supp. 1208, 1212, 1213 (S.D. Miss. 1992) (submission to an exam under oath is a material policy condition and refusal forfeits insured's right to recover under policy); *Saucier v. United States Fid. & Guar. Co.*, 765 F. Supp. 334, 336 (S.D. Miss. 1991) (no legal excuse for failure to submit to exam under oath on fire claim; failure voided coverage under policy and insurance company was entitled to summary judgment); *United States Fid. & Guar. Co. v. Conaway*, 674 F. Supp. 1270, 1272, 1273 (N.D. Miss. 1987) (insured's refusal to provide financial information after fire loss because it was private and request was allegedly unreasonable voided policy coverage; refusal was not cured by later provision, after claim denial, of limited information that did not substantially comply with insurance company's request), *aff'd*, 849 F.2d 1469 (5th Cir. 1988).

Standard Ins. Co. of New York, 227 Miss. at 406, 86 So. 2d at 301 (insured can cure initial refusal to sit for exam under oath only by later offer within reasonable time to submit). *See also Wigginton*, 964 F.2d at 491 (if insured has valid reason for initially declining exam under oath, it is insured's responsibility thereafter to offer to submit to one as soon as possible); *Archie*, 813 F. Supp. at 1213 (initial refusal to sit for exam under oath, followed by offer 9 months later to sit for deposition after insured filed suit did not satisfy obligation to provide exam under oath).

A conditional offer to sit for an exam under oath does not suffice, and the insured is not entitled to dictate the terms of the questioning under oath. *Wigginton*, 964 F.2d at 491-92 (insured initially refused exam and then offered to sit for one three months later if insurance company would waive rights concerning voiding of policy; condition attached to offer by insured made offer of no effect); *Mars*, 246 Miss. at 41-42, 148 So. 2d at 719-20 (offer to answer written questions and produce documents did not cure refusal to sit for oral exam under oath; coverage voided); *Standard Ins. Co. of New York*, 227 Miss. at 406, 86 So. 2d at 301 (insured cannot dictate what constitute reasonable questions during exam under oath).

Provision of unsworn statements – even numerous unsworn statements – does not satisfy the obligation to provide an exam under oath when the insurer requests it. *Mars*, 246 Miss. at 41-42, 148 So. 2d at 719-20 (numerous statements taken by adjuster, agents, sheriff and state fire marshal did not satisfy obligation to give oral exam under oath when requested by insurer; refusal voided policy coverage). *See also Pervis v. State Farm Fire and Cas. Co,*. 901 F.2d 944, 946, 946 n.3, 947-48 (11th Cir. 1990) (three recorded statements are not equivalent of providing exam under oath; refusal to give exam under oath breached insurance contract; coverage voided).

An insurance company is not required to accuse an insured of arson in order to have a right to take an examination under oath or seek financial information. In *Allison v. State Farm Fire &*

Cas. Co., the insureds claimed that questions regarding their financial status were immaterial because the insurance company never formally accused them of arson and did not raise arson as a defense to their suit. This Court rejected that argument, stating simply "We disagree."*Allison*, 543 So. 2d at 663-64.

This Court's decision in *Allison* was consistent with its previous holding in *Southern Guar. Ins. Co. v. Dean*, in which a policy's coverage was voided by an insured's failure to answer material questions about finances or produce financial records. This Court noted that no evidence was required that the insured was connected with an arson and, in fact, held it was unnecessary to decide whether there was even any arson connected with the fire. *Dean*, 252 Miss. at 72, 76-78, 172 So. 2d at 554, 556-57. Thus, evidence of incendiary origin is not a prerequisite to an insurance company's right to take an examination under oath or request financial records following a fire loss. *Id. See also*, *Gates v. State Farm Gen. Ins. Co.*, 749 F. Supp. 1237, 1241 (S.D. Miss. 1990) (insurance company's request for examination under oath was reasonable as a matter of law even where fire marshal could not determine whether fire was accidental or incendiary); *Mars*, 246 Miss. at 42, 148 So. 2d at 720 (insurance company was entitled to conduct investigation of its own even though fire marshal and sheriff reported they found no evidence of arson); *Trahan v. Fire Ins. Exchange*, 179 S.W.3d 669, 674 (Tex. Ct. App. 2005) (reasonable suspicion of arson not required before insurance company can request exam under oath regarding a fire claim, where policy language does not require same as predicate to request for exam).[7]

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[7] As the Circuit Court correctly noted, the policy provisions concerning examination under oath and production of financial records apply to types of claims other than fire claims. (RE at 16; RV6 at 810.) The Farm Bureau policy language contains nothing making evidence of incendiary origin a requirement before a request is made for an exam under oath or production of financial records after a fire loss.

III. The Trial Court Properly Granted Summary Judgment, Concluding As a Matter of Law that Mrs. Mullen Voided Her Policy Coverage by Refusing to Sit for an Exam Under Oath and by Refusing to Produce Requested Financial Records.

A. There Is No Genuine Issue of Material Fact As to Whether Mrs. Mullen Refused Farm Bureau's Request That She Sit for an Examination Under Oath and Produce Financial Records.

The Circuit Judge properly held, as a matter of law, that Mrs. Mullen, through her counsel, refused Farm Bureau's request that she provide an examination under oath concerning her fire loss. The Circuit Judge also properly held, as a matter of law, that Mrs. Mullen, through her counsel, refused to produce requested financial records. There is simply no other way to interpret the uncontradicted facts in this matter. There are no competing inferences, whatsoever, to be drawn from what occurred. Mrs. Mullen is bound by the positions taken by her counsel. *Franklin v. BSL, Inc.*, 987 So. 2d 1050, (¶¶14-16) (Miss. Ct. App. 2008) (client bound by authorized act of attorney on client's behalf).

Farm Bureau, through its counsel Chris Deaton, clearly requested that Mrs. Mullen contact Mr. Deaton to arrange a time and date on which she could present herself to provide an exam under oath and produce certain financial records. After a phone call from someone identifying himself as Gene Mullen and indicating the requests would be refused, Deaton sent Mrs. Mullen another letter at her regular address, explaining Mississippi law's requirements concerning examinations under oath.[8] Mrs. Mullen then retained counsel, who wrote to Farm Bureau's attorney and quite clearly declined to arrange for the exam and production of financial records. The letter from Norris Hopkins to Chris Deaton simply cannot be interpreted as anything other than a refusal. For the Court's

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8 There is a presumption in Mississippi law that a properly addressed and mailed letter was received at the address to which it is directed. *Holt v. Mississippi Emp. Sec. Comm'n*, 724 So. 2d 466, ¶¶17-24 (Miss. 1998). A bare denial that mail was received is insufficient to overcome the presumption, particularly when facts show earlier and later notices were received at same address. *Id.*

convenience, it is quoted again, as follows:

> Please be advised that this firm has been retained to represent the Mullen's regarding this requested statement under oath by Farm Bureau. First and foremost, please provide me with a copy of the policy language that allows for Farm Bureau to violate the Mullens' privacy, and furthermore, provide me with authority which allows Mississippi Farm Bureau to get three sworn statements from their insureds. Furthermore, please provide legal authority which would allow Farm Bureau, under the policy language, to be able to request information such as tax returns, credit card statements, applications for business and personal loans, personal and business checking accounts, phone records, and bankruptcy petitions.
>
> It appears that Farm Bureau is in bad faith denying this claim and requesting information in violation of the Mullens' privacy rights. The Mullens have complied with the policy language and have given not only one, but two statements already, and it has been over three months since the date of this loss. We hereby call upon Farm Bureau to comply with the Contract of insurance with the Mullens and pay for their loss under the policy under five (5) days from the date of this correspondence.
>
> Certainly the Mullens will continue in good faith to cooperate with Farm Bureau, however, this intentional violation of the privacy rights and demands that far exceed what is required under the policy will not be tolerated. Please provide me with a copy of the transcript of both statements under aoth that have already been taken by Farm Bureau. If after you provide all the information requested, we determine that indeed Farm Bureau has a right under the policy to move forward with the third statement, then we will be happy to arrange same.

(RE at 131-32; RV2 at 219-20.)

Mr. Hopkins accused Farm Bureau of acting in bad faith by requesting an examination under oath and production of financial records. He asserted that Mrs. Mullen had already complied with the policy by giving two statements. He demanded that the claim be paid within five days of the date of his letter. Mr. Hopkins improperly conditioned the question of any further statements on his own determination of what was reasonable. He offered no dates or times on which Mrs. Mullen could,

or would, appear in compliance with Farm Bureau's request.[9]

Nevertheless, Farm Bureau did not deny the claim at that time. Instead, Farm Bureau's counsel sent yet another letter to Mr. Hopkins on July 2, advising that Mrs. Mullen had not previously given any exam under oath and that her prior statements were unsworn, recorded statements. Mr. Deaton also forwarded Mr. Hopkins a copy of Mrs. Mullen's policy and copies of the prior recorded statements. Those prior statements clearly show that they were simply recorded statements taken by adjusters, were not sworn, and did not constitute examinations under oath. *Mars*, 246 Miss. at 41-42, 148 So. 2d at 719-20 (numerous unsworn statements taken by adjuster, agents, sheriff and state fire marshal did not satisfy obligation to give oral exam under oath when requested by insurance company; refusal voided coverage). *See also Pervis,* 901 F.2d at 946, 946 n.3, 947-48 (three recorded statements are not equivalent of exam under oath; refusal to give exam under oath breached policy; coverage voided); *Spears v. Tennessee Farmers Mut. Ins. Co.*, 300 S.W. 3d 671, 682 (Tenn. Ct. App. 2009) (recorded statement not equivalent of exam under oath); *Watson v. National Surety Corp.*, 468 N.W.2d 448, 450, 451 (Iowa 1991) (recorded statement not equivalent of exam under oath even if insured says answers are truthful and correct). Mrs. Mullen's statement in her interrogatory answers that she believed or understood that she was previously under oath is not material or controlling. *Spears*, 300 S.W. 3d at 678, 681-82 (Tenn. Ct. App. 2009) (insured's belief that recorded statement was under oath does not satisfy policy; failure to provide answer to questions under oath voided policy after auto fire).

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Mrs. Mullen criticizes Farm Bureau for not demanding that she appear at a particular place and time, as opposed to asking her to provide a date and time on which she could, and would, appear. Farm Bureau should not be criticized for trying to schedule the exam with a measure of courtesy to Mrs. Mullen, as opposed to making a demand that she appear at a particular place and time whether convenient to her, or not. None of this Court's prior cases have set forth any rule that an insurance company is required to make such a demand in order for its request to be valid.

Although Mrs. Mullen's counsel denied in an affidavit that he received Mr. Deaton's July 2 letter, that bare denial is not sufficient to overcome the presumption in Mississippi law that a letter properly addressed did, in fact, arrive properly at the address to which it was sent. (RV11 at 12, 14.) This is particularly so when other letters sent to that address admittedly arrived there. *Holt*, 724 So. 2d at ¶¶17-24 (Miss. 1998). Moreover, this statement by Mr. Hopkins, along with his statement that Farm Bureau did not provide copies of Mrs. Mullen's prior statements until June 2009 during discovery in this matter, is flatly contrary to the trial court record. On January 20, 2009 when answering Farm Bureau's counterclaim, Mr. Hopkins referenced and attached a copy of Mrs. Mullen's recorded statement of April 17, 2008 – i.e., one of the statements enclosed with the July 2, 2008 letter that Hopkins claimed not to have been provided. *Compare* pre-suit unnumbered copy of recorded statement at RV1 at 76, 81-112 *with* bates numbered copy produced by Farm Bureau in discovery at RE 54-58, RV4 at 519-50. It is plain that Mrs. Mullen cannot create a **genuine** issue of **material** fact based on an affidavit that is clearly contrary to the documentary evidence contained in the record of this Court. *Callicut*, 974 So. 2d at ¶16; *Archie*, 813 F. Supp. at 1212-13.

After receiving no response to its July 2 communication, Farm Bureau still withheld any denial of the claim, and Mr. Deaton wrote to Hopkins again on August 6, 2008, noting that Farm Bureau would wait another two weeks for a response before closing its file. Although Mr. Hopkins denies receiving that letter, as well – even though the letter was admittedly properly addressed – this does not create a genuine issue of material fact. Mississippi law again presumes the letter was delivered as directed, and a mere denial stating it was not received does not suffice to overcome the

presumption.[10]

Farm Bureau then waited over one month without any response before issuing a claim denial on September 11, 2008. The denial letter – directed to Mrs. Mullen through Hopkins at the same address as the previous letters – was undisputedly received. Instead of retracting the refusal and offering at that time for Mrs. Mullen to provide the requested examination under oath and financial records, Mr. Hopkins took the position that Mrs. Mullen's prior statements were sufficient regardless of whether they were sworn or unsworn and that Mrs. Mullen had complied with the conditions of her policy. There was no offer of any date or time for Mrs. Mullen to sit for an examination under oath or produce the requested financial records.

Following an initial refusal to sit for an exam under oath, an insured can only cure that refusal by retracting it within a reasonable time and offering to sit for the exam. *Home Ins. Co.*, 355 So. 2d at 313; *Standard Ins. Co. of New York*, 227 Miss. at 406, 86 So. 2d at 301. *See also Wigginton*, 964 F.2d at 491; *Archie,* 813 F. Supp. at 1213. The September 19 letter from Mr. Hopkins did not retract the initial refusal and contained no offer provide an exam under oath or produce records.

Certainly, no later than the end of September 2008, Mr. Hopkins possessed a copy of all the letters from Farm Bureau counsel, including those he denied initially receiving. (RE at 137; RV5 at 608.) Nevertheless, none of the subsequent letters written by Hopkins contained any offer to sit for an exam under oath or produce financial records. The refusal stood unretracted. In short, Mrs. Mullen chose to defend her improper refusal and sued Farm Bureau, alleging bad faith. The Circuit

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Throughout the Appellant's Brief, Mrs. Mullen's counsel suggests that there is some issue regarding whether Mr. Deaton actually mailed all of his letters on the dates noted, alleging some insufficiency in the language of Deaton's affidavit. There is no such genuine issue of material fact in this case. Mr. Deaton's affidavit clearly establishes that the dates of the letters and that they were mailed to the recipients to whom they were addressed on the dates noted. (FBRE at Tab 2.)

Court correctly noted that she did so without ever having complied with the conditions of her policy. (RE at 5; RV6 at 799.) That being the case, the Circuit Court properly held that Mrs. Mullen voided any coverage under her policy and forfeited her claim. (RE at 5-22; RV6 at 799-816.) *Allison*, 543 So. 2d at 663-64; *Taylor*, 306 So. 2d at 645-46; *Dean*, 252 Miss. at 72, 76-78, 172 So. 2d at 554, 556-57; *Mars*, 246 Miss. at 41-42, 148 So. 2d at 719-20; *Standard Ins. Co. of New York*, 227 Miss. at 409, 86 So. 2d at 302.[11]

This case is, in fact, similar to that presented to this Court in *Boston v. Mars*, and the Circuit Court Judge correctly recognized that fact. In *Mars*, the insured's counsel refused to produce his client for an examination under oath on grounds that the insured had given numerous prior unsworn statements to law enforcement and an insurance adjuster. *Mars*, 246 Miss. at 41, 148 So.2d at 719. Instead, the insured's counsel stated that only written questions would be answered under oath, along with a production of documents. *Id.* This Court rightly recognized that this did not fulfill the insured's duties under policy provisions like those at issue in this case, and the Court held as a matter of law that coverage under the policy was voided. *Mars*, 246 Miss. at 41-42, 148 So. 2d at 719-20.

This case is actually more egregious than *Mars*, since Mrs. Mullen did not even offer to provide any financial documentation or even answer written questions under oath. Rather, through her counsel, she simply refused to provide either an exam under oath or financial records. The Circuit Court was correct to issue a summary judgment in Farm Bureau's favor, dismissing Mrs. Mullen's suit and sustaining Farm Bureau's counterclaim for declaratory judgment. That ruling should be affirmed.

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Federal courts applying Mississippi law have held the same on numerous occasions. *Wigginton*, 964 F.2d at 490 (collecting numerous case at 490 n. 7); *Archie*, 813 F. Supp. at 1212, 1213; *Saucier*, 765 F. Supp. at 336; *Conaway*, 674 F. Supp. at 1272, 1273.

B. There Is No Genuine Issue of Material Fact that Mrs. Mullen's Previous Statements to Farm Bureau Were Merely Unsworn, Recorded Statements Taken By Adjusters.

The statements that Mrs. Mullen gave to Farm Bureau's adjuster are attached to her response to Farm Bureau's motion for summary judgment.[12] On their face, they are clearly unsworn. They reflect that Mrs. Mullen was not, at any point, placed under oath. This is true, despite any alleged belief or understanding she might have had to the contrary. Certainly, her counsel understood upon viewing the statements that they were not under oath, and Mrs. Mullen is bound by the actions of her counsel. *Franklin*, 987 So. 2d at ¶¶14-16. At the pleading stage of this suit, Mr. Hopkins obviously possessed a pre-suit copy of Mrs. Mullen's unsworn recorded statement given April 17, 2008. He referenced it in his January 20, 2009 answer to Farm Bureau's counterclaim and actually attached it as an exhibit to that answer. (RV1 at 76, 81-112.) All the affidavits in the world cannot erase this fact and make the unsworn statement into a sworn statement.

Although Mrs. Mullen argues that a jury could infer Farm Bureau removed some supposed portion of the statement(s) involving oath-taking, there is absolutely nothing in the record to support such an inference. A party cannot avoid summary judgment based on inferences that are not reasonably drawn from the record. Manufactured issues simply do not count. *Callicut*, 974 So. 2d at 216. The same is true of the suggestion that Farm Bureau somehow prevented Mrs. Mullen from signing the recorded statements. The recorded statements – signed or not – did not fulfill the conditions of her policy regarding an exam under oath. *Mars*, 246 Miss. at 41-42, 148 So. 2d at 719-

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At one point in her Brief, Mrs. Mullen suggests that Farm Bureau improperly presented these statements to the trial court in unauthenticated form, and she argues that Farm Bureau cannot rely on them. This argument is meritless. It was actually Mrs. Mullen who exhibited these items as her own statements in response to Farm Bureau's motion for summary judgment. It was Mrs. Mullen who used them to argue that they fulfilled her obligations under the policy. (RV4 at 486-87, listing Plaintiff's exhibits.) They clearly do not.

20; *Pervis,* 901 F.2d at 946, 946 n.3, 947-48 (11th Cir. 1990) There is simply no genuine issue of material fact in this regard. All of the suggestions that Farm Bureau somehow altered the statements are entirely unsupported by anything in the record. No jury could reach reasonably reach any such inference. These suggestions were never made to the Circuit Court. They should be ignored, not only because they are outlandish, but also because they were never raised in the first instance in the trial court. *Boyd v. State*, 47 So. 3d 121, (¶10) (Miss. 2010).

C. There Is No Genuine Issue of Material Fact As to Whether Farm Bureau's Request for a Single Examination Under Oath Was Reasonable.

1. A Long Line of Cases Establishing Mississippi Law Has Treated a Request for One Examination Under Oath Following a Loss as Per Se Reasonable.

No Mississippi case has ever held that one request for one examination under oath presents any question of fact regarding "reasonableness." In fact, the reported cases treat such a single request as being reasonable as a matter of law, and policy coverage was forfeited by those insureds that refused to comply with such requests. *Allison*, 543 So. 2d at 663-64; *Taylor*, 306 So. 2d at 645-46; *Dean*, 252 Miss. at 72, 76-78, 172 So. 2d at 554, 556-57; *Mars*, 246 Miss. at 41-42, 148 So. 2d at 719-20; *Standard Ins. Co. of New York*, 227 Miss. at 409, 86 So. 2d at 302. The federal cases interpreting Mississippi law on this point have recognized the same principle, as enunciated by this Court. *See supra* p. 25, note 6 (collecting federal court decisions applying Mississippi law).

Once again, Mrs. Mullen runs afoul of this Court's decision in *Boston v. Mars*, in which one request for one exam under oath was made after the insured had given several unsworn statements to law enforcement officials and an insurance adjuster. The refusal to sit for an exam under oath was deemed in *Mars* to void the insured's policy coverage. *Mars*, 246 Miss. at 41-42, 148 So. 2d at 719-20. Likewise, the refusal in this case voids Mrs. Mullen's coverage as a matter of law.

Cain v. United States Fire Ins. Co., 2008 WL 2094235 (S.D. Miss. 2008), relied on by Mrs. Mullen regarding the question of reasonableness does nothing to help her on this point. In *Cain*, the insured actually submitted to one examination under oath. Any confusion and question of reasonableness occurred over the issue of second requested exam under oath. *Cain*, 2008 WL 2094235 at *2. In this case, there was no confusion over a second exam and no question of reasonableness of any request for a second exam. Only one exam was requested. Mrs. Mullen clearly declined to provide it.

Similarly, Farm Bureau's single request that Mrs. Mullen produce financial records was per se reasonable, and there is no question of fact in that regard. Mississippi law holds Farm Bureau was entitled to documentation of Mrs. Mullen's finances.

> [T]he simple act of answering questions concerning her [the insured's] financial position could not provide sufficient information to make a determination as to any possible monetary motive underlying the fire. In short, the insurers were entitled to reliable documentation to support and supplement Mooney's [the insured's] answers.

Monticello Ins. Co. v. Mooney, 733 So. 2d 802, (¶24) (Miss. 1999).

The Circuit Court correctly granted summary judgment to Farm Bureau. There was no genuine issue of material fact presented under which any jury could have reasonably found that Farm Bureau's request for one examination under oath was unreasonable.

2. The Circuit Court Correctly Held that Farm Bureau Was Not Required to Possess or Demonstrate Evidence that the Fire Was Incendiary Before Requesting Financial Records and an Examination Under Oath.

Contrary to Mrs. Mullen's position, there is no prerequisite to a request for an examination under oath or production of financial records that an insured be accused of arson. *Allison*, 543 So.2d at 663-64 (dispatching with a simple, "We disagree," the suggestion that an insurance company must

accuse an insured of arson before seeking answers to questions regarding insured's financial status). In fact, such a prerequisite would be nonsensical. An exam under oath and production of financial records is a legitimate part of an insurance company's investigation into whether a fire loss is, or is not, payable. To require that an insurance company make such an accusation prior to completing its investigation and deciding whether such an accusation has validity would put the cart before the horse. It would also be contrary to Farm Bureau's valid policy provisions, which state:

Section I - CONDITIONS

> **2. Your Duties After Loss.** In case of a loss to covered property, you must see that the following are done:
> . . . .
>
> **f.** As often as we reasonably require:
> . . . .
>
> **(2)** Provide us with records and documents we request and permit us to make copies; and
>
> **(3)** Submit to examination under oath, while not in the presence of any other "insured," and sign the same.
> . . . .

(FBRE Tab 1 at 197; RV2 at 197.) The insurance policy issued to Mrs. Mullen is a contract and is interpreted just as any other contract. *Noxubee County Sch. Dist. v. United Nat'l Ins. Co.*, 883 So. 2d 1159 (¶ 16) (Miss. 2004). It contains no prerequisite that an insured be accused of arson before an examination under oath is requested or before financial records are requested. Mrs. Mullen cannot avoid summary judgment by engrafting a requirement into the policy that simply does not exist. *Mississippi Farm Bureau Mut. Ins. Co. v. Walters*, 908 So. 2d 765 (¶ 14) (Miss. 2005) (insurance policy interpreted according to its terms; court will not change terms of unambiguous policy).

Similarly, there is no prerequisite that evidence exist that a fire was incendiary before an insurance company can request an exam under oath or request production of financial records. Although Mrs. Mullen argues otherwise, this Court has previously rejected any prerequisite of evidence of incendiary origin in the absence of policy language requiring it. In *Southern Guar. Ins. Co. v. Dean*, a policy's coverage was voided by an insured's failure to answer material questions about finances or produce financial records. This Court expressly noted that no evidence was required that the insured was connected with an arson and, in fact, this Court held it was completely unnecessary to decide whether there was even any arson connected with the fire. *Dean*, 252 Miss. at 72, 76-78, 172 So. 2d at 554, 556-57. *See also Mars*, 246 Miss. at 42, 148 So. 2d at 720 (insurance company was entitled to conduct investigation of its own even though fire marshal and sheriff reported they found no evidence of arson). Other courts have likewise recognized that evidence of incendiary origin is not necessary in order for an insurance company to request an exam under oath or production of an insured's financial records. *Gates,* 749 F. Supp. at 1241 (insurance company's request for examination under oath was reasonable as a matter of law even where fire marshal could not determine whether fire was accidental or incendiary); *Trahan v. Fire Ins. Exchange*, 179 S.W.3d 669, 674 (Tex. Ct. App. 2005) (reasonable suspicion of arson not required before insurance company can request exam under oath regarding a fire claim, where policy language does not require same as predicate to request for exam).

The Circuit Court therefore correctly noted that evidence of arson or incendiary origin was not necessary to its decision in this case. (RE at 8; RV6 at 802.) Although the Circuit Court reserved ruling on Farm Bureau's rebuttal exhibit and noted the exhibit did show evidence of incendiary origin, the Circuit Court expressly stated that "the presence or absence of this exhibit is not critical to the Court's decision." (RV6 at 802.) The Circuit Court's ruling in this regard should

be affirmed, and any suggestion should be rejected that the Circuit Court relied in some improper manner on the rebuttal exhibit proferred by Farm Bureau's counsel during the hearing on the motion for summary judgment. The proffer was made simply to rebut the misrepresentation that no evidence of incendiary origin existed,[13] but evidence of incendiary origin was not necessary to support the Circuit Court's ruling and the Circuit Court made clear that it did not consider that evidence to be necessary.

D. There Is No Requirement in Mississippi Law that Farm Bureau Demonstrate Prejudice To Justify Denial of a Claim When an Insured Refuses a Request for an Examination Under Oath and for Production of Financial Records.

Mrs. Mullen argues that the Circuit Court should have required a showing of prejudice by Farm Bureau before voiding her insurance coverage, even in light of her refusal to sit for an examination under oath and to provide requested financial records. In making this argument, Mrs. Mullen relies on cases concerning automobile liability insurance notice and cooperation clauses. *Employers Mut. Cas. Co. v. Ainsworth*, 164 So.2d 412 (Miss. 1964) and *State Farm Mut. Auto. Ins. v. Commercial Union Ins. Co.*, 394 So.2d 890 (Miss. 1981). As the Circuit Court correctly held, these cases concerning automobile insurance are inapposite. *Ainsworth* held that an allegation of breach of the notice/cooperation clause in an auto liability policy is an affirmative defense and that lack of cooperation is a jury question. *Ainsworth*, 164 So. 2d at 417-18. *Commercial Union* held that prejudice must be shown under an auto liability policy when an insured fails to cooperate with the insurer in investigation of a third-party accident claim, breaching the notice/cooperation clause.

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Farm Bureau had made clear in its answer and declaratory counterclaim that there was evidence of incendiary origin. That evidence of incendiary origin was, in part, the subject of Farm Bureau's second motion for protective order in which Farm Bureau took the position that Mrs. Mullen sought to discovery material that was irrelevant to the denial of her claim based on her refusal to provide an exam under oath and financial records.

Commercial Union, 394 So. 2d at 893.

This Court has never required any showing of prejudice before voiding policy coverage based on an insured's refusal to provide an examination under oath and financial records under dwelling coverage. *Allison*, 543 So. 2d at 663-64; *Taylor*, 306 So. 2d at 645-46; *Dean*, 252 Miss. at 72, 76-78, 172 So. 2d at 554, 556-57; *Mars*, 246 Miss. at 41-42, 148 So. 2d at 719-20; *Standard Ins. Co. of New York*, 227 Miss. at 409, 86 So. 2d at 302. None of these cases required the insurance company to demonstrate prejudice. All that was required was demonstration of the insured's refusal. The same is true of the federal cases, previously cited, interpreting Mississippi law. *See supra* p. 25, note 6. In particular, the Fifth Circuit has held that no showing of prejudice is required. *Wigginton*, 964 F.2d at 490 n.9 (citing *Hall v. State Farm Fire & Cas. Co.*, 937 F.2d 210 (5th Cir. 1991) (no showing of prejudice required when breach of concealment clause voided coverage).

There is a material difference between the automobile liability cases cited by Mrs. Mullen and this Court's jurisprudence developed concerning dwelling coverage. The automobile insurance cases implicate the notice and cooperation clauses of the automobile insurance policies in question in third-party accident cases. *Ainsworth*, 164 So. 2d at 413-18; *Commercial Union*, 394 So. 2d at 890. By contrast, the refusal to provide an exam under oath or financial records in the face of a loss claimed under a dwelling policy violates the policy's misrepresentation and concealment clauses. *Dean*, 252 Miss. at 72, 76-78, 172 So. 2d at 554, 556-57 (Miss. 1965)(refusal to answer material questions on exam under oath concerning finances and refusal to produce material financial records voided policy coverage and forfeited insured's rights under policy; refusal violates concealment clause in policy); *Standard Ins. Co. of New York*, 227 Miss. at 409, 86 So. 2d at 302 (insured's refusal to answer material questions during exam under oath constituted a violation of policy and of clause prohibiting concealment and misrepresentation and voided his right to recover under policy).

See also Wigginton, 964 F.2d at 490 n.9 (citing *Hall v. State Farm Fire & Cas. Co.*, 937 F.2d 210 (5th Cir. 1991).

In the case of a loss under a dwelling policy, the insured's refusal impairs, outright, the insurance company's investigation of the claim. Impairment of the insurance company's investigation into the claim constitutes prejudice, per se. This Court has held that:

> an insurance company has the right to "possess itself of all knowledge, and all information as to other sources and means of knowledge, in regard to the facts, material to their rights, to enable them to decide upon their obligations, and to protect them against false claims."

Standard Ins. Co. of New York v. Anderson, 227 Miss. at 407, 86 So. 2d at 301 (quoting *Claflin v. Commonwealth Ins. Co.*, 110 U.S. 81, 85 (1883)). An insured's refusal to submit to an exam under oath and produce requested financial records deprives the insurance company of these rights and deprives it of the ability to protect itself against false claims. For this reason, no showing of prejudice by the insurance company is required beyond the fact of the insured's refusal to comply with the insurance company's requests under the policy conditions.

The Circuit Court correctly held that no showing of prejudice was required. (RE at 19; RV6 at 813.)[14] Farm Bureau's policy issued to Mrs. Mullen clearly states:

> **Comprehensive Dwelling Package Policy**
> **(Standard)**
>
> **AGREEMENT**
>
> We will provide the insurance described in this policy in return for the premium and compliance with all applicable provisions of this policy.

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Other states that have considered this exact question have held that compliance with a request for an exam under oath is a condition precedent to policy coverage. *Spears*, 300 S.W.2d at 681; *Watson*, 468 N.W.2d at 451 (collecting cases from numerous jurisdictions).

(FBRE Tab 1 at 187; RV2 at 187.) Mrs. Mullen indisputably did not comply with all of the applicable provisions of her policy. Under the policy provisions, such compliance is a prerequisite to coverage. Under the policy and under this Court's prior jurisprudence concerning refusals to provide examinations under oath and requested financial records, Mrs. Mullen voided her coverage. The refusal, in and of itself, prejudiced Farm Bureau as a matter of law by impairing its investigation into the fire loss. The Circuit Court's grant of summary judgment should be affirmed.

E. Because Farm Bureau Has Not Changed Its Position or Asserted any Contradictory Positions, Mrs. Mullen's "Mend the Hold" Argument Is Meritless.

At pages 34-36 of her Brief, Mrs. Mullen asserts that Farm Bureau is "mending its hold" by asserting that she did not comply with her policy provisions concerning provision of requested financial information. She argues that the Circuit Court's summary judgment in favor of Farm Bureau should be reversed for that reason. In the course of this argument, Mrs. Mullen asserts that Farm Bureau did not rely on her refusal to produce financial records when it denied her claim. Both positions are incorrect.

Farm Bureau's claim denial letter of September 11, 2008, sent via Farm Bureau's counsel, quoted the entire policy provision concerning provision of records and examinations under oath. (RE at 133-34; RV2 at 228-29.) Mrs. Mullen had been asked to appear at an exam under oath and bring certain records to that exam. She undisputedly did neither. Farm Bureau's was entitled, under this Court's previous decisions, to deny her claim on both grounds. It did so. It also sought a declaratory judgment on both grounds when Mrs. Mullen sued without complying with the clear conditions of her policy. Therefore Mrs. Mullen's citation to *Banker's Life and Cas. Co. v. Crenshaw* is inapposite. There was no assertion here of a policy provision concerning denial of Mrs. Mullen's claim that was not quoted in Farm Bureau's denial letter to her, and there has been no

variant defense. *See Crenshaw*, 483 So.2d 254, 273 (Miss. 1985).

The cases cited by Mrs. Mullen concerning "mending the hold" likewise do not apply in this case. The doctrine established in those cases prevents a party from taking one position in litigation and then changing that position entirely ("180 degrees") in order to attempt to gain some advantage. *Ohio & M.R. Co. v. McCarthy*, 96 U.S. 258, 267-68 (1877) (company initially defended case by claiming it was impossible to forward cattle on a Sunday for lack of rail cars; company later tried to change position and defend that it was illegal to ship cattle on Sunday); *Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 363 (7th Cir. 1990) (coverage initially denied because of alleged egregious conduct of company directors, followed by "180 degree" change to coverage defense that no wrongdoing had been shown). Farm Bureau has not taken one position and then changed it, much less changed it 180 degrees. Farm Bureau's position has maintained throughout that Mrs. Mullen's refusal to submit to an exam under oath and produce financial records voided any coverage she might otherwise have had under her dwelling package policy. Farm Bureau's position is neither bogus nor phony. Farm Bureau's position and the reasons for it are well-documented and are completely consistent with the law in this State concerning an insured's obligations following a fire loss.

F. The Circuit Court Correctly Held that Farm Bureau's Policy Does Not Require It to Pay Any Claim Within 60 Days Following Submission of a Proof of Loss.

Next, Mrs. Mullen argues that Farm Bureau's policy absolutely required it to pay her claim within 60 days after her submission of a sworn proof of loss. The Circuit Court was correct in holding that this is not what Farm Bureau's policy says. Rather, the policy states:

> Loss will be payable 60 after we receive your proof of loss ***and***:
>
> a. Reach an agreement with you;

b. There is an entry of a final judgment; ***or***

c. There is a filing of an appraisal award with us.

(FBRE Tab 1 at 199; RV2 at 199.) (emphasis added). The policy clearly does not simply state that all losses will be paid within 60 days after receipt of a proof of loss. That clause is followed by a critical "and." None of the events following the word "and" ever occurred in this instance.

An insurance policy is nothing more than a contract, and Mississippi law requires interpretation of insurance policies under the same law as other contracts. *Noxubee County Sch. Dist.*, 883 So. 2d at ¶ 16; *Boteler v. State Farm Cas. Ins. Co.*, 876 So.2d 1067 (¶ 12) (Miss. Ct. App. 2004). If a provision of an insurance policy is clear and unambiguous, it is to be interpreted and applied as written, according to its plain meaning. *Noxubee*, 883 So. 2d at ¶ 13; *Robley v. Blue Cross/Blue Shield of Miss.*, 935 So.2d 990 (¶ 18) (Miss. 2006). Whether a policy provision is unambiguous is judged by its own language, and is a question of law for the Court, not a fact question for a jury. *Noxubee*, 883 So. 2d at ¶ 13 (question of law for the court); *State Auto. Mut. Ins. Co. of Columbus v. Glover*, 253 Miss. 477, 176 So. 2d 256, 258 (1965) (provision judged by its own language).

> Ambiguity . . . can not be forced into a policy where there is none. This Court has held that it will not rewrite or deem a contract ambiguous where the language is clear and indicative of its contents.

Walters, 908 So. 2d at ¶ 14. A policy provision is not ambiguous unless (a) one of its terms is susceptible to multiple **reasonable** meanings; or (b) there is an internal conflict between policy provisions that makes the meaning of the policy as a whole uncertain. *Walters*, 908 So.2d 765 (¶¶ 11-12) (Miss. 2005).

The Circuit Court was correct in its finding that this Farm Bureau policy provision is not ambiguous and did not absolutely require payment of Mrs. Mullen's claim within 60 days of Farm

Bureau's receipt of her proof of loss. No agreement was reached with Mrs. Mullen as required by this policy clause as a prerequisite to payment. Instead, there was a definite disagreement.

The Circuit Court was also correct in noting that *Gates v. State Farm Gen. Ins. Co.*, held that such a clause does not create any absolute contractual requirement that a claim be paid in 60 days. The Circuit Court quoted the *Gates* decision as follows:

> "The Court notes that to hold insurers operating under similar 60-day provisions to strict compliance with such periods regardless of the reasonable requirements of an investigation would make it possible for claimants to intentionally and improperly delay investigation of their claims, thus forcing insurers to choose between making claims decisions without adequate information and violating the terms of the policy."

(RV6 at 815) (quoting *Gates*, 740 F. Supp. at 1241).[15]

Here, Farm Bureau received Mrs. Mullen's sworn proof of loss on April 4, 2008. Farm Bureau continued its investigation into the fire after that time and, by letter from its counsel dated May 29, 2008, requested that Mrs. Mullen submit to an examination under oath and produce financial records. She refused to do so. The Circuit Court was right in stating:

> Plaintiff argues the request came only 6 days before expiration of the 60-day period and that an examination under oath could not have been accomplished in that time. This ignores that Mrs. Mullen declined completely to give an examination under oath and produce financial records. Nowhere does she take the position that she would, for some reason, have submitted to the examination under oath and production of financial records if only Farm Bureau's request had been made earlier in the 60-day period. As a matter of law, the request for an examination under oath in the circumstances of this case was reasonable, *Gates*, 740 F. Supp. at 1241. The Court rejects Plaintiff's argument that Farm Bureau breached the loss payment provisions of the policy.

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The Circuit Court also rightly noted that *Reece v. State Farm Fire & Cas. Co.*, 684 F. Supp. 140 (N.D. Miss. 1987), did not apply to the situation at hand. In *Reece*, the insured did submit to an exam under oath, and that parties' dispute concerned a request for submission to a second exam under oath.

(RV6 at 815.) The Circuit Court's decision in this regard should be affirmed. There is absolutely nothing in the record to suggest that Mrs. Mullen would have complied with Farm Bureau's request if its timing had been different. Instead, Mrs. Mullen, via her counsel, took the position that her previous recorded statements satisfied the policy conditions and that Farm Bureau was in breach of the policy by requesting anything further. The Circuit Court's decision should be affirmed.

G. The Circuit Court Judge Did Not Draw Any Contested Inferences From the Facts, But Simply Stated the Uncontradicted Facts as They Were Presented in the Parties' Submissions.

Finally, throughout pages 21-31 of her Brief, Mrs. Mullen criticizes the trial court's opinion, asserting that it made findings on disputed facts and drew inferences against her. This is not so. A brief review of some of those criticisms is necessary to demonstrate that this characterization of the Circuit Court's opinion is incorrect. The Circuit Court simply made findings as to which facts were uncontradicted. It did not make any findings as between disputed facts.

First, Mrs. Mullen states that the Circuit Court found a disputed fact when it noted that she filed suit against Farm Bureau without ever providing an exam under oath. She likewise argues that the Circuit Court found a disputed fact against her when the Court noted that her previous statements were simply recorded and not under oath. The statements given by Mrs. Mullen on April 3 and April 17, 2008 and submitted by her (not by Farm Bureau) in response to the motion for summary judgment demonstrate clearly on their face that they were not under oath. (RE at 30-36; 41-48; 54-112; RV4 at 501-15; 519-72; RV5 at 573-77.) Mrs. Mullen's interrogatory answers stating she understood or believed them at the time to be under oath (RE at 120; RV5 at 626) are plainly not material. Interrogatory answers and affidavits that attempt to defy the clear documentary evidence do not create genuine issues. Rather, they are an attempt to manufacture issues where none actually exist. This is particularly so when Mrs. Mullen's attorney clearly possessed a pre-suit copy of her

April 17, 2008 recorded statement (as demonstrated by the court record at RV1 at 76, 81-112) and could obviously see and understand it was not given under oath. In any event, Mrs. Mullen took the position that the unsworn recorded statements complied with the policy. Rather than ignore Mrs. Mullen's interrogatory answers, the Circuit Court rightly treated them as immaterial. *Spears*, 300 S.W. 3d at 678, 681-82 (Tenn. Ct. App. 2009) (insured believed that previous recorded statement was under oath when it was not; policy voided for failure to submit to requested exam under oath).[16]

Mrs. Mullen criticizes the trial court's statement that no financial information or listing of accounts was provided by Mrs. Mullen along with the initial release of financial information provided by her to Bureau. However, that is nothing more than a true statement of fact. Mrs. Mullen does not claim to have ever produced any financial documentation or written listing of accounts to Farm Bureau. It is simply a true statement – without any drawing of inferences whatsoever – that the financial release was provided without any such accompanying listing or documentation. (RE at 39; RV4 at 497.)[17]

Mrs. Mullen claims that the trial court's statement that no flammable liquids were stored in the master bedroom or master bathroom closet has no support in the record and is an inference

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The continued attempts of Mrs. Mullen's counsel to describe these statements as "sworn" and, in fact, to claim that they somehow were sworn simply demonstrates the weakness of Mrs. Mullen's position. Mischaracterizations of the record evidence cannot carry the day and defeat a valid summary judgment. No matter how many times Mrs. Mullen or her counsel characterize these recorded statements as sworn, they obviously were not. Additionally, certain of the interrogatory response excerpts at Appellant's RE 121-123 were not in the trial court record at the time of the summary judgment. They were added in Appellant's designation of the record on appeal. *See* RV8 at 1096-1098. Mrs. Mullen's only interrogatory responses before the trial court are found at RV5 at 612-628. *Martin*, 998 So.2d at ¶9 n.2 (matters not in record by summary judgment stage not considered).

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It should go without saying that a financial release is, in and of itself, useless without provision of names of financial institutions, account numbers, and addresses to which the release can be directed. Mrs. Mullen ultimately refused to provide such documentary evidence to Farm Bureau when it was requested to be produced at an examination under oath.

improperly drawn against Mrs. Mullen. That is not so. In her recorded statement of April 17, 2008 Mrs. Mullen stated there were no flammable liquids in the master bedroom or bathroom, as follows:

> Q. Okay would any of those kinda things flammable liquids had been kept in the master bedroom or the master bedroom closet or the master bathroom?
> A. No sir.
> Q. Okay.
> A. Not that I know of.

(RE at 64-65; RV4 at 529-30.) Similarly, Mr. Mullen stated:

> Q. I understand. Would any of these type of materials, any flammable liquids be in the uh, in the, in your bedroom or bathrooms of the house?
> A. No, no.
> Q. Or any of the closets?
> A. No, no. I mean, you know, cleaning stuff is going to be in the bathroom. You know, you, you, you know what I'm saying.

(RE at 100; RV4 at 565.) Again, the trial court simply cited the uncontradicted facts of what the Mullens' statements said. No inferences whatsoever were drawn.

At page 25 of her Brief, Mrs. Mullen criticizes the trial court's findings regarding what financial information she did provide in her recorded statements, versus what information was not included. A review of the Mullens' recorded statements demonstrates that the trial court's findings were factual and correct. None of the findings were skewed either for or against Mrs. Mullen. A cursory review of the recorded statements reveals that no loan or account numbers were given for the Mullens' accounts and loans. It reveals that the trial court was correct in stating that payment addresses were not provided. While some financial information was provided (as acknowledged by the trial court's findings regarding provision of lender and bank names where accounts were held), the information was simply not complete. (RE at 30-36; 41-48; 54-112; RV4 at 501-15; 519-72; RV5 at 573-77.) This is exactly why this Court has held that an insurance company is entitled to

documentary evidence concerning an insured's financial condition. *Mooney*, 733 So. 2d at ¶24.

Mrs. Mullen wrongly says the trial court's opinion was skewed against her when it noted that the Mullens had a prior fire loss, that State Farm cancelled their insurance afterward, and that she did not know why. Again, Mrs. Mullen's own recorded statement says:

> Q. What did they cancel, the house insurance?
> A. I don't, yes.
> Q. Okay well the house burned though.
> A. Right.
> Q. So they –
> A. They cancelled out, they they didn't want no more dealings and I don't know why.
> Q. Okay.
> A. But they say that they're bad about if you have any any kind of claim they're gonna cancel you out.

(RE at 72; RV4 at 537.) Clearly, Mrs. Mullen said exactly what the trial court noted. No inferences were drawn. Although she speculated based on what she had heard about the effect of claims, she said did not know why State Farm no longer wanted dealings with them.

Mrs. Mullen states at page 29 of her brief that the trial court made findings of "hotly disputed" fact when it stated that Chris Deaton's letters were mailed and that his July 2 and August 6, 2008 letters received no response. This is a truly amazing statement. Mr. Deaton's affidavit establishes, without contradiction, that the letters were sent. (FBRE TAb 2; RV2 at 2211-23; RV6 at 785-87.) It is also uncontradicted that no one responded to these letters, as they are the very ones Mrs. Mullen's counsel, Norris Hopkins, claims he did not receive. (RE at 135-36; RV2 at 230-31.)

In short, a review of the trial court's opinion reveals a straightforward recitation of uncontradicted facts based on the summary judgment evidence presented to the trial court by both sides. No inferences are drawn at all, and no facts are skewed. There is no basis for reversal in these criticisms advanced by Mrs. Mullen, many of which are themselves skewed characterizations of the

evidence before the Court made simply in an effort to avoid summary judgment.

The Circuit Court cut to the heart of this matter and to what was material and indisputable – Mrs. Mullen refused to submit to an examination under oath and refused to produce financial records requested by Farm Bureau. Mississippi law is clear that this voided any coverage under her dwelling package policy issued by Farm Bureau.

CONCLUSION

Consistent with a long line of cases from this Court, from Mississippi's federal courts, as well as from courts in other jurisdictions, the Circuit Judge held that Mrs. Mullen voided any coverage under her Farm Bureau dwelling package policy when she refused to comply with Farm Bureau's request for one examination under oath and production of financial records. That decision should be affirmed. The refusal to provide an examination under oath impaired Farm Bureau's investigation and violated the misrepresentation and concealment clause of Mrs. Mullen's policy.

Farm Bureau respectfully requests that this Court affirm the decision of the Circuit Court of Tippah County, granting summary judgment to Farm Bureau and taxing all costs to Mrs. Mullen.

Respectfully submitted this 3rd day of March, 2011.

By: _____

JAMES R. MOORE, JR. (MSB [redacted]
JANET G. ARNOLD (MSB [redacted]
MICHAEL C. GATLING (MSB [redacted]
COPELAND, COOK, TAYLOR & BUSH, P.A.
600 Concourse, Suite 100
1076 Highland Colony Parkway (39157)
Post Office Box 6020
Ridgeland, Mississippi 39158
Telephone: 601.856.7200
Facsimile: 601.856.7626
Counsel of Record for Defendant/Appellee Mississippi Farm Bureau Casualty Insurance Company

CERTIFICATE OF FILING

I, Janet G. Arnold, do hereby certify that I have this day caused to be hand-delivered for filing, via courier, the original and three correct paper copies and an electronic disc of the Brief for Appellee, Mississippi Farm Bureau Casualty Insurance Company to:

Ms. Kathy Gillis
Mississippi Supreme Court Clerk
Gartin Justice Building
450 High Street
Jackson, Mississippi 39201

This 31st day of March, 2011.

Janet G. Arnold (MSB [redacted])

CERTIFICATE OF SERVICE

I, Janet G. Arnold, do hereby certify that I have this day caused to be mailed via United States Mail, first class, postage pre-paid, a true and correct copy of the Brief for Appellee, Mississippi Farm Bureau Casualty Insurance Company to:

Hon. Andrew K. Howorth
Circuit Court Judge
1 Courthouse Square, Suite 201
Oxford, Mississippi 38655

Clyde H. Gunn, III
Christopher C. Van Cleave
W. Corban Gunn
David N. Harris, Jr.
Corban, Gunn, & Van Cleave, PLLC
Post Office Drawer 1916
Biloxi, Mississippi 39533-1916
Counsel for Appellant, Brenda L. Mullen

A. Norris Hopkins, Jr.
Hopkins, Barvie & Hopkins, PLLC
Post Office Box 1510
Gulfport, Mississippi 39502-1510
Counsel for Appellant, Brenda L. Mullen

This 31st day of March, 2011.

Janet G. Arnold (MSB #[redacted])