IN THE SUPREME COURT OF MISSISSIPPI

BRENDA L. MULLEN — APPELLANT

VS. — CASE NO. 2010-CA-00058

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

APPEAL FROM THE CIRCUIT COURT OF TIPPAH COUNTY, MISSISSIPPI

BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRENDA L. MULLEN	**APPELLANT**
VS.	**CASE NO. 2010-CA-00058**
MISSISSIPPI FARM BUREAU CASUALTY INSURANCE COMPANY	**APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned Counsel of Record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Circuit Court Judge, (Tippah County):	The Honorable Andrew K. Howorth
Appellant:	Brenda L. Mullen (and Husband, Gene Mullen)
Appellee:	Mississippi Farm Bureau Casualty Insurance Co.
Attorneys for Appellant:	Clyde H. Gunn, III, Esquire Christopher C. Van Cleave, Esquire W. Corban Gunn, Esquire David N. Harris, Jr., Esquire Corban, Gunn & Van Cleave, PLLC A. Norris Hopkins, Jr., Esquire Hopkins, Barvie & Hopkins, PLLC
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ATTORNEYS OF RECORD FOR APPELLANT, BRENDA L. MULLEN

ORAL ARGUMENT REQUESTED

Appellant requests Oral Argument in this matter because it presents, among other issues material to this Appeal, an issue of considerable importance to Mississippi law which arguably has not been expressly addressed by this Court. One of several reasons justifying reversal of the Trial Court's Order is that Appellant, Plaintiff below, presented the Trial Court with a genuine issue of material fact about whether the Defendant insurance company's requests for information were "reasonable", where the subject insurance policy expressly provides the insured's duties of cooperation are dependant upon "reasonable" requests by the insurer. Although this Court has repeatedly found requests that an insured submit to an examination under oath are "legitimate" or "justified" when the insurer possesses evidence the fire was suspicious and/or incendiary, Counsel for Appellant has not found where this Honorable Court has previously expressly addressed whether the "reasonableness" of a request to submit for an examination under oath under a fire policy must be determined by a Jury where there is no such evidence, and where the insured swears she had previously given statements under oath. Given the importance of this apparently unanswered question to Mississippi law in the area of insurance, Appellant respectfully submits Oral Argument would be beneficial to fully address and flesh out this, and the other important issues raised by this Appeal.

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRENDA L. MULLEN **APPELLANT**

VS. **CASE NO. 2010-CA-00058**

MISSISSIPPI FARM BUREAU CAS. INS. CO. **APPELLEE**

BRIEF OF THE APPELLANT – ORAL ARGUMENT REQUESTED

Appellant, Brenda L. Mullen, Plaintiff in the Trial Court proceeding ("Plaintiff"), appeals from the *Findings of Fact and Conclusions of Law* (RE 5-22; R 799-816) and *Mississippi Farm Bureau Casualty Company's Proposed Judgment* (RE 23; R 817) entered by the Circuit Court of Tippah County, Mississippi, and requests this Honorable Court Strike, Reverse, and Remand all of the findings, conclusions, orders and judgments therein, and Order all costs be awarded to the Plaintiff.

I. STATEMENT OF THE CASE

A. Procedural History in Trial Court

On November 10, 2008, Plaintiff filed a Complaint against Farm Bureau for breach of contract and bad faith breach of contract, arising from Farm Bureau's wrongful denial of Plaintiff's insurance claim on a house fire that occurred on March 31, 2008. R 1-13 Farm Bureau Answered on December 19, 2008, and also filed a Counter Claim for Declaratory Judgment. R 18-74 In its 2nd and 4th Affirmative Defenses, Farm Bureau alleged Plaintiff acted in bad faith and/or breached its duty of good faith with regard to the underlying fire loss and insurance claim. R 25 In its 9th and 10th Affirmative Defenses, Farm Bureau affirmatively pled Plaintiff violated Section 1 – Conditions, Paragraph 2 and its subparagraphs titled "Your Duties After Loss" of a dwelling policy, and that Plaintiff's claims were barred by alleged failure to fulfill the (cooperation) requirements set forth in her policy. R 26

In its Counter Claim, Farm Bureau admitted it issued a dwelling policy covering the Plaintiff's secondary home at 540 County Road, Falkner, Tippah County, Mississippi; and that the policy was in effect at the time the dwelling and its contents were damaged by fire on March 31, 2008. R 32 Plaintiff filed an Answer to Farm Bureau's Counter Claim for Declaratory Judgment on January 22, 2009. R 75-80

Plaintiff served her First Set of Interrogatories, Requests for Production of Documents, and Requests for Admission on January 20, 2009. R 116-125 Farm Bureau served its First Set of Interrogatories, Requests for Production and Requests for Admission on or about January 29, 2009. R 126-127 Farm Bureau filed a Motion for Protective Order on February 23, 2009, alleging Plaintiff's interrogatories and requests for production exceeded the permissible number. Farm Bureau filed the subject Motion for Summary Judgment on May 4, 2009, and a Motion to Compel on May 12, 2009.

Undersigned Counsel for Plaintiff entered his appearance on April 29, 2009. R 165-167. Pursuant to agreement of Counsel, the Trial Court entered an Agreed Order resolving Farm Bureau's Motions for Protective Order and to Compel, and granting Plaintiff time to respond to Farm Bureau's Motion for Summary Judgment. (R 266-267) In compliance therewith, Plaintiff served revised discovery requests on Farm Bureau on May 18, 2009 (264-265), and Responses to Farm Bureau's Interrogatories and Requests for Production on May 29, 2009 (R 268-269); Farm Bureau served responses to Plaintiff's Interrogatories and Requests for Production on or about June 5, 2009 (R 270-272); and Plaintiff served her Response and Memorandum in Opposition to Farm Bureau's Motion for Summary Judgment on June 11, 2009. R 482-628

On June 8, 2009, Farm Bureau filed its Second Motion for Protective Order, alleging Plaintiff's Interrogatories and Requests for Production sought "irrelevant" information. R 273-

481 Therein, Farm Bureau admitted "it has not been alleged by Farm Bureau that Plaintiff, or someone acting on behalf of the Plaintiff, intentionally burned the dwelling at issue." R 274, ¶ 5 Plaintiff filed her Response in Opposition to Farm Bureau's Motion for Protective Order on June 15, 2009. R 629-756

Farm Bureau filed its Rebuttal re: Motion for Summary Judgment on June 24, 2009. R 761-780. Farm Bureau alleged it requested an examination under oath of the Plaintiff on May 29, 2008, "following the determination that the cause of the fire was intentional in nature." R 762, ¶ A Although Farm Bureau appeared to acknowledge the necessity of evidence the fire was suspicious and/or intentional to make a request for a *third* statement reasonable, Farm Bureau failed to present any evidence in support of its allegations that the circumstances of the fire were "suspicious" or intentional in either its Motion for Summary Judgment or Rebuttal.

The Trial Court heard oral argument on Farm Bureau's Motion for Summary Judgment on October 14, 2009. T 1-47 At the conclusion of the Hearing, the Trial Judge stayed discovery, held Farm Bureau's Second Motion for Protective Order in abeyance, and took Farm Bureau's Motion for Summary Judgment under advisement. The Trial Judge requested both parties supply the Court with proposed findings of fact and conclusions of law. T 45-46 *Farm Bureau's Proposed Findings of Fact and Conclusions of Law*, and *Farm Bureau's Proposed Judgment*, were sent to the Trial Judge on or about November 13, 2009. R 1311-1331 *Plaintiff's Proposed Findings of Fact and Conclusions of Law* were sent to the Trial Judge on November 16, 2009. R 1286-1310

The Trial Court entered *Findings of Fact and Conclusions of Law*, which are virtually identical to *Farm Bureau's* [18 page] *Proposed Findings of Fact and Conclusions of Law*, on December 8, 2009. RE 5-22; R 799-816 (Compare with R 1311-1331) The only differences

between the Trial Court's *Findings of Fact and Conclusions of Law* and *Farm Bureau's Proposed Findings of Fact and Conclusions of Law* are that the Trial Court:

a. Removed "*Farm Bureau's Proposed*" from title. (compare RE 5 with R 1814);

b. On page 3, first full paragraph, deleted "brief, unsworn" from Farm Bureau's proposed finding that "On April 3, 2008, Brenda and Gene Mullen gave **brief, unsworn** recorded statements to a Farm Bureau Adjuster. (Compare RE 7 with R 1316);

c. On page 3, last sentence of second full paragraph, deleted "Finally" from Farm Bureau's proposed finding that "**Finally**, on April 8, she submitted a list of the personal property . . . ." (Compare RE 7, R 801 with R 1316);

d. On page 13, first full paragraph, changed "determined" to "was convinced", and "was" to "to be" from Farm Bureau's proposed finding that "Farm Bureau's request was subsequently met with a response from Mrs. Mullen's counsel that no such examination and production would be had unless her counsel **determined [was convinced]** it **was [to be]** reasonable." (Compare RE 77, R 8011 with R 1326);

e. On page 13, first full paragraph, deleted "conspicuously" and "whatsoever" from Farm Bureau's proposed finding that "**Conspicuously**, the subsequent correspondence by Mrs. Mullen's counsel to Farm Bureau's counsel contains no change of position and no offer **whatsoever** for her to submit to an examination under oath or produce the requested financial records." (Compare RE 77, R 8011 with R 1326);

f. On page 17, near the end of first full paragraph, deleted all of the **bolded** language from Farm Bureau's proposed finding that:

> 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 **and there is no ironclad requirement under the policy or Mississippi law that Farm Bureau's investigation be completed within 60 days. Having completely declined to**

> **comply with Farm Bureau's request for an examination under oath and production of Financial Records, Mrs. Mullen cannot complain that Farm Bureau did not ask sooner so that she could decline sooner. As a matter of law, based on the uncontradicted facts of record,** the Court rejects Plaintiff's argument that Farm Bureau breached the loss payment provisions of the policy.

(Compare RE 21, R 815 with R 1330-1331).

The Trial Court also executed and entered without making any changes the *Mississippi Farm Bureau Casualty Insurance Company's Proposed Judgment* previously submitted by Farm Bureau on December 8, 2009, GRANTING Farm Bureau's Motion for Summary Judgment and Farm Bureau's Counter Claim for Declaratory Judgment, Dismissing Plaintiff's Complaint with prejudice, and taxing all costs to the Plaintiff. RE 23; R 817 Plaintiff filed her Notice of Appeal on January 5, 2010, perfecting appeal of all of the Trial Court's findings, rulings and judgments. R 818-819. Plaintiff fully complied with the other requirements for perfecting this appeal.

B. Statement of the Facts

1. March 31, 2008: Date of the Fire

Plaintiff suffered a fire loss at her secondary home, 540 County Road 320, Falkner, Mississippi, on March 31, 2008. RE 24, 37-38; R 496, 498-499 At the time of the loss, the dwelling was insured under a Comprehensive Dwelling Package Policy of insurance issued by Farm Bureau, Policy Number DP-C19148, which was in full force with all premiums paid in full. R 32, 177-213 The only "named insured" is the Plaintiff, Brenda Mullen. R 178

The fire was responded to and investigated by the Falkner Volunteer Fire Department. Fire Chief Petie Rutherford completed and signed an investigative report, dated March 31, 2008, which concluded the "suspected cause" was "heat and air unit shorted out"; and which asserted the Fire Department was dispatched at 8:21 a.m., and returned at 9:41 a.m. RE 24; R 496

Plaintiff promptly put Farm Bureau on Notice of her claim, and provided Farm Bureau

with a copy of Chief Rutherford's March 31, 2008 Report. RE 24; R 625, 496, 1097 The "Original Loss Notice" in Farm Bureau's Claim File reveals the loss was reported through Farm Bureau Agent John Rush on April 1, 2008, at 9:29 a.m. RE 25; R 963 The next entry in Farm Bureau's claim file reveals the claim was assigned to adjuster Delia Essary, and notes the fire was "due to heating/air unit shorting out." RE 26; R 964 In another Claim File entry on April 1, 2008, titled "Dwelling Package Claim Sticker", Delia documented the total amount of insurance potentially available to respond to the Plaintiff's claim is $97,200. RE 26-27; R 964-965

The subject policy of insurance provides, in pertinent part:

> **SECTION 1 – CONDITIONS**
> **2. Your Duties After Loss.** In the case of a loss to covered property, you must see that the following are done:
> f. As often as we *reasonably* require:
> (1) Show the damaged property;
> (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.

(emphasis added). RE 28-29; R 197-198

2. April 3, 2008: First Statements Under Oath, and Plaintiff's Execution of All Releases and Provision of All Information Requested by Farm Bureau

On April 3, 2008, Plaintiff voluntarily provided Farm Bureau with a statement, wherein she answered all of the questions asked by Farm Bureau's representative. RE 30-36; R 509-515 Corey Wilburn conducted the statement on behalf of Farm Bureau (RE 30; R 509) and, in response to his questions, Plaintiff identified the mortgage company on the insured dwelling and identified the mortgage company on her primary residence (RE 31; R 510). Plaintiff explained the Fire Department advised the fire started near the heating unit / furnace, in the hallway (RE 34; R 513), and that, at the time the Fire Department called her husband (Gene) to give notice of the fire, her husband was in the shower at their primary residence, and she was at medical rehab

after recent heart surgery. RE 35; R 514 Plaintiff confirmed she had nothing to do with the fire. RE 35; R 514 In her sworn response to Interrogatories, **Plaintiff swears this statement was given under oath**; that she gave him all of the information he requested; that Mr. Wilburn did not request any further information at the end of the meeting; and that, after Wilburn turned the tape recorder off, he told Plaintiff he did not expect there would be any problems with resolving her claim. RE 115-117, R 617-622; RE 121-123, R 1096-1098; R 1107

Plaintiff also executed a sworn and notarized *Sworn Statement Proof of Loss*, on a form provided by Farm Bureau, where she set forth the amount of the claim and swore:

> This loss did not originate by any intentional act, design, or procurement on my/our part or by anyone insured by this policy. I/We have not done or consented to anything that would violate the conditions of this policy. . . .

The *Sworn Statement Proof of Loss* was provided to and initialed by Farm Bureau Adjuster Corey Wilburn on April 3, 2008. RE 37-38; R 498-499 The policy has a provision that required Farm Bureau to pay the Plaintiff's claim within 60 days from receiving her sworn proof of loss. RE 49; R 199

On April 3, 2008, Plaintiff also executed a "Release of Financial Information", on a form provided by Farm Bureau, wherein she provided her social security number and gave Farm Bureau full and complete access to all financial information held by

> . . . any bank, savings institution, mortgage company, credit reporting service, federal or state governmental agency or department, creditor, supplier, insurance company, gaming institution or other financial institutions of whatever kind or nature.

The executed *Release* gave Farm Bureau the right to gather and receive from all types of financial institutions "copies of any and all financial information in the possession of" said entities and/or their employees; and to have *ex parte* communications with all of the entities referenced regarding any and all financial information of the Plaintiff. The Release was

provided to and initialed by Farm Bureau Adjuster Corey Wilburn on April 3, 2008 RE 39; R, 497 On April 3, 2008, Plaintiff also executed an *Authorization to Enter Premises and To Take Samples*, giving Farm Bureau unfettered access to the burned dwelling; and a *Non Waiver Agreement.* RE 40; R, 500; R 966

On April 3, 2008, Plaintiff's Husband (who is not an "insured") also voluntarily provided Farm Bureau with a statement, wherein he answered all of the questions asked by Farm Bureau's representative. RE 41-48; R 501-508 During the interrogation, conducted by Corey Wilburn (RE 41; R 501), Mr. Mullen identified the mortgage company on the insured dwelling, and the balance owed on the mortgage (RE 43; R 503);[1] identified the mortgage company on the Mullens' primary home RE 43; R 503; confirmed the electricity in the insured home was always on, and that the home had a central electric heating system RE 44; R 504; explained the Fire Department advised him the fire started in the hall, by the central heating unit, and revealed that the electric heating unit was approximately 16 years old. RE 46; R 506 Mr. Mullen affirmed that he had nothing to do with the fire. RE 48; R 508

A diagram of the insured dwelling, which Farm Bureau titled a "**Total** Fire Loss", was received by Farm Bureau's Tupelo Claims office on April 4, 2008. RE 50; R 970 An entry by "District 9 Claims" in Farm Bureau's Claim file, dated March 31, 2008, concludes the subject loss was a "**Total** Fire Loss due to fire", and that the cause of the "Total Loss" was "Fire due to heating/air unit shortin". RE 51; R 516 On April 8, 2009, Plaintiff provided Farm Bureau with an executed list of personal property destroyed in the fire, noting there was not much left in the secondary dwelling, and provided Farm Bureau with a written instruction to "handle as you want

[1] Personal information such as social security numbers, loan balances, monthly expenses and the like was redacted from the alleged transcripts produced with Plaintiff's Response in Opposition to Summary Judgment to protect this personal, confidential information from the public domain.

on contents". RE 52-53; R 517-518

3. April 17, 2008: Date of Second Statements Under Oath

Sometime after she met with Corey Wilburn, a man from Grenada who identified himself as Dennis Welch called Plaintiff, told her he was a special investigator for Farm Bureau, and that he needed to meet with Plaintiff and her husband to take a statement under oath. Pursuant to Welch's request, Plaintiff and her husband drove to Corinth and gave statements under oath on April 17, 2008. RE 115-117, R 617-628; RE 122-123, R 1097-1098; R 1107, RE 54-85; R 519-550. In her response to Interrogatories, Plaintiff swears she was required to give this statement outside the presence of her husband, and that it was given under oath. RE 115-117, R 617-628; RE 122-123, R 1097-1098; R 1107 In response to Welch's interrogation (RE 54; R 519), Plaintiff provided the Farm Bureau representative all of the information he requested:

a. Provided birth date, social security number; home phone number, and the name of the Mullens' dirt moving business RE 54-55; R 519-520;

b. Identified mortgage company and amount of monthly mortgage payment on the insured dwelling, confirmed mortgage was current at the time of the fire, provided approximate date the monthly mortgage payment was due (the 12th), and confirmed the March 12, 2008 payment had been made but that the April 12, 2008 payment had not yet been made [as of this 4/17/08 statement]. Also volunteered the balance of the mortgage on the primary residence and confirmed there was no secondary mortgage. RE 58; R 523 Also provided amount of monthly mortgage payment at her primary residence, and confirmed that figure included escrow for taxes and insurance RE 82; R 547;

c. Confirmed she found out about the fire when she returned home after rehab (for heart surgery), that she did not take her cell phone with her to rehab, that her daughter drove her to rehab the morning of the fire, that she was not at the insured dwelling during that time, and that the dwelling was usually locked RE 60-62; R 525-527;

d. Confirmed may have had wasp spray in dwelling, that they had a Coleman lantern, and at one time kept cans of Coleman lantern fuel at the home, and that cans of fuel may have been there at the time of the fire RE 63, 64; R 528, 529;

e. Confirmed dwelling was not for sale, but that people had offered to buy the home from time to time; and provided amount of money dwelling appraised for a couple of years prior to the fire RE 66-67, 72; R 531-532, 537;

f. Identified a previous fire loss on a different dwelling about 14 years previously, and that State Farm paid the claim; and explained State Farm canceled her insurance after paying the claim, noting "but they say they are bad about that if you have any kind of claim they're gonna cancel you out" RE 68-69, 72; R 533-534, 537;

g. Confirmed a prior Farm Bureau claim involving a stolen Dodge truck that was never recovered RE 70-71; R 535-536;

h. Revealed she is bookkeeper for household and A&D Dirt Movers, identified the bank where her checking account (personal and business) is kept, and confirmed she has no savings account RE 72; R 537;

i. Identified financed vehicles, the institution with which each is financed, how many car payments are due each month, the loan balance on each, and even identified the finance company for the vehicle of her 30 years old live at home daughter. Also identified a financed camper, and provided the balance owed and the monthly payment amount RE 72-75; R 537-540;

j. Identified all credit cards possessed, provided the balance due on each, and confirmed she usually pays the monthly balance in full; and confirmed there are no other loans at the bank RE 75-76; R 540-541;

k. Confirmed there is a loan balance to John Deer Credit for heavy equipment used by the business, and provided an estimated balance RE 77; R 542;

l. Confirmed no tax liens against her RE 78; R 543;

m. Identified a lien on the insured dwelling by Gulf Coast Bank, related to a lost automobile title several years back where the financing bank had gone out of business, and explained the circumstances and unenforceability of that lien RE 78-79; R 543-544;

n. Confirmed she had never been in a lawsuit, and confirmed no debts other than those disclosed to the interviewer RE 79-80; R 544-545;

o. Confirmed she recently underwent open heart surgery, and stated belief that hospital had written off the bills related to that treatment. Also supplied the monthly cost of medications RE 80-81; R 545-546;

p. Confirmed A&B Dirt Movers is the only source of income RE 81; R 546;

q. Provided the total amount of monthly bills for utilities and electricity, the amount of money spent monthly on groceries, the amount of money spent annually on clothing, and confirmed no other household expenses than those disclosed to interviewer RE 82-83; R 547-548;

r. Confirmed she owns no stocks or bonds RE 83; R 548;

s. Confirmed she has never been arrested for a crime RE 83; R 548;

t. Stated she had no idea what caused the fire RE 83; R 548; and

u. Affirmed her answers were "true and correct" RE 85; R 550.

On April 17, 2008, Plaintiff's Husband also voluntarily gave Farm Bureau another statement. RE 86-112; R 551-577 In her sworn response to Interrogatories, Plaintiff swears that this statement was given under oath. RE 115-117, R 617-628; RE 122-123, R 1097-1098; R 1107 In response to Welch's interrogation (RE 86; R 551), Plaintiff's husband provided the Farm Bureau representative with all of the information he requested:

a. Gave birth date, social security and driver's license number RE 86-87; R 551-552;

b. Confirmed he and Plaintiff moved out of insured house in 2006 RE 88; R 553;

c. Confirmed he has own business, A&B Dirt Movers, that the business is an LLC involved in building subdivisions and moving dirt, and that the business has and utilizes heavy equipment including bulldozers, track hoe, and back hoes RE 88-89; R 553-554;

d. Explained he would never let anyone who smoked stay in the insured secondary dwelling (RE 90; R 555), and explained his daughter would go the house several times a week to clean it; and that his daughter called the dwelling her house. Revealed the house would have been his daughter's house – he expected she would live in it after she got married, so she could stay close to home. RE 94; R 559 Explained the Mullens were **not** trying to sell the house, but that they had a lot of people ask about it; and that when people would ask him about the house, he would give them an "off the wall price and if they wanted to pay it they could". Revealed that Tommy Wilbanks had inquired about purchasing the house 2 to 3 days before the fire, and provided the figures he gave Mr. Wilbanks as an ["off the wall"] asking price. Confirmed Mr. Wilbanks did not want to buy the house for that price. Explained there were a lot of prospective buyers who would have bought the house if Mr. Mullen would have financed it for them – **but that he was saving the home for his daughter** RE 101-102; R 566-567;

e. Explained one of his employees, Joe Williamson, was living in a camper trailer parked near the carport of insured dwelling at time of fire – but that Williamson left town a couple of days before the fire; and offered to take Mr. Welch to Mr. Williamson if he needed to speak with him RE 90-91; R 555-556;

f. Confirmed he and the Plaintiff lived in the insured dwelling for a number of

years, and provided the name of mortgage company on the insured dwelling, and the small balance owed on the mortgage. Also confirmed the amount of the monthly note on the mortgage, and that the current month's mortgage payment had not yet been made on the home, but that the mortgage was otherwise up to date; and that there was no second mortgage RE 91-92; R 556-557;

g. Confirmed that were not many contents in the insured dwelling, and advised that Farm Bureau could do "whatever they wanted to do" on the contents claim RE 93; R 558;

h. Explained he missed a call on his cell phone while in the shower, called the number back when he got out, and Chief Rutherford told him he put a fire out at the insured dwelling. Explained the Fire Department was gone when he got to the dwelling, that he walked inside and looked around, that it looked like main fire was behind the furnace; and revealed the Master bath and walk in closet were behind the furnace RE 94-95; R 559-560;

i. Described his activities for the 24 hours before the fire RE 96; R 561;

j. Explained Fire Chief told him they had to break into the doors of the home, and that he does not know how the Fire Department discovered the fire RE 99-100; R 564-565;

k. Revealed there would probably have been some charcoal lighter fluid in the house, but that he did not know for certain if there was any there at time, but that there has never been any gasoline or diesel in home. Also confirmed cleaning supplies would likely be in the bathroom; and concluded that he really can't say for certain what flammable materials may have been in the house. RE 100-101; R 565566;

l. Confirmed most everything that was in the house, including the food in the fridge, belonged to the Mullens RE 101; R 566;

m. Explained he and Plaintiff lived in the dwelling for about 12 years RE 103; R 568;

n. Revealed several cars and trucks insured are through Farm Bureau (RE 103; R 568); but explained all of his business insurance was through Steve Brown in Winona, who the interviewer expressed familiarity with, and invited interviewer to talk with Steve Brown about the business if he wanted to. RE 106; R 571;

o. Confirmed he had never been in a lawsuit, and never been canceled by an insurance company that he knows of RE 106; R 571;

p. Confirmed his primary residence is also insured through Farm Bureau, and that Farm Bureau would thus have information related to mortgage on that home RE 106; R 571;

q. Confirmed he never sought personal or business bankruptcy, there are no tax liens against his property, that there are no lawsuits against his business; and that he has never been refused credit or had a mortgage foreclosed RE 107-108; R 572-573;

r. Confirmed Plaintiff had recent open heart surgery, and high blood pressure, and

that he had prostrate cancer. Provided an estimate of the total amount of bills for Plaintiff's open heart surgery, and that they would pay on the bills monthly; and explained (re: Plaintiff's open heart surgery) "we haven't met with [doctors] yet, they said when we got through that, we could work [bills] all out.", volunteering the medical bills are not covered by any insurance. RE 108-109; R 573-574;

s. Explained he does not take a regular check or salary for the business, just writes a check when he needs a little living expense RE 110; R 575;

t. Confirmed he has never been arrested for a crime RE 110; R 575;

u. Confirmed he does not know who would have had a motive to set the fire, and does not know how the fire started RE 110; R 575;

v. Confirmed answers were "true and correct" RE 110; R 575.

In her sworn interrogatory responses, Plaintiff explained another Farm Bureau adjuster, "Delilah", inspected the insured dwelling on another occasion, however she does not remember the exact date. "Delilah" told the Plaintiff the damages caused by the fire amounted to a "total loss" of Plaintiff's dwelling and personal contents insured under the Farm Bureau policy. RE 115-117, R 617-628; RE 122-123, 1097-1098; R 1107

Welch took a recorded statement of Fire Chief Petie Rutherford on May 7, 2008. R 578-583 Chief Rutherford answered all of Farm Bureau's questions, and his answers were consistent with the investigative report he completed on March 31, 2008. Chief Rutherford:

a. Revealed he had been Chief of the Falkner Fire Department since 1996, and had been fighting fires for about 15 years R 578;

b. Explained he was working at Fire station when alarm came in, and was a first responder R 579;

c. Confirmed all doors to the home were locked, so they kicked them open R 579;

d. Confirmed the windows to the house were all closed and locked R, 581, 582;

e. Explained he eventually determined the fire started in the backside of the furnace, and that a bathroom is located behind the furnace R 581-582;

f. Confirmed Fire Investigator from the Sheriff's department was out of town R 582;

g. Explained he called Gene Mullen and left a message, and that Mr. Mullen called back and said he was in the shower, and said he would be over as quick as he could after the Chief explained the situation R 582.

4. May 29, 2008: Farm Bureau Requests A *Third* Statement Under Oath

The Record contains a letter, dated May 29, 2008, addressed to Plaintiff and signed by Chris H. Deaton, Esquire. Therein, Deaton requested Plaintiff "submit to an examination under oath to be conducted by Chris or Dana Deaton", and requested Plaintiff "produce at the place set for the examination"

1. All inventories and lists of any property for which you make claim under the above described policy, including receipts for the purchase of same, if available;
2. All receipts, bills of sale, installment loan agreements and other documents pertaining to or in any way connected with the acquisition or sale of the home and/or its contents, including all liens, notes and payment books relating to same;
3. A copy of your driver's license;
4. Information, including, if available copies of, all applications for any loans, both personal and/or business, made by or applied for by you during the 12 month period before the loss;
5. A complete list of all credit cards; with account numbers, available either for personal or business use by you for the period April 1, 2007 to the present;
6. All personal and business checking and savings account records for accounts to which you have or had access for the period April 1, 2007 to the present;
7. Your state and federal income tax returns, with all schedules, and W-2 forms for 2006 and 2007;
8. All phone records, including cellular phone detail call and text listing for one week prior to the fire through one day after, being specifically March 24, 2008 through April 1, 2008, for any phone at the loss premises and any other phone number held in your name or in any place in which you resided or maintained a business or to which you had regular access, including all cellular phones, whether maintained in your name or another's;
9. A copy of all bankruptcy petitions ever filed by you, complete with all schedules or if not available the location of he court where any bankruptcy was filed;

RE 128-130; R 599-601 The letter instructed Plaintiff to call Deaton "upon receipt of this letter", and asserting "should you fail to make contact with us within two (2) weeks to schedule the examination, you will be deemed in breach of the conditions of the contract . . . ." *Id.*

There is **no evidence** in the Record about **when** this letter, which is dated Thursday, May

29, 2008 (just four (4) days before the expiration of 60 days from Plaintiff's submission of *Sworn Statement Proof of Loss*), was actually mailed to, or received by the Plaintiff. Farm Bureau attached an un-signed Affidavit of Deaton to its Motion for Summary Judgment, wherein Deaton merely alleged his office sent a letter "dated May 29, 2008" to the Plaintiff.[2] R 221-223, ¶ 4 In her sworn interrogatory responses, Plaintiff asserted she contacted a lawyer after receiving a request for a *third* statement under oath, but that she does not recall whether that request was in writing or oral. RE 115-117, R 617-628; RE 122-123, R 1097-1098; R 1107 The Affidavit of Norris Hopkins affirms Plaintiff delivered a copy of the May 29, 2008 letter to him on June 23, 2009. RE 124-130; R 595-601

The Record also contains an alleged letter addressed to Plaintiff from Deaton dated June 13, 2008. R 943-944 Plaintiff's interrogatory responses affirm she has no recollection of receiving this alleged letter. RE 115-117, R 617-628; RE 122-123, R 1097-1098; R 1107 Deaton's unsigned affidavit, attached to Farm Bureau's Motion for Summary Judgment, merely alleges his office sent a letter "dated June 13, 2008". R 221-223, ¶ 5

5. June 24, 2008: Plaintiff's Lawyer Requested Information and Offered to Cooperate

A. Norris Hopkins, Jr., Esquire sent a letter to Farm Bureau's representative on June 24, 2008, wherein he informed Farm Bureau of his representation of the Plaintiff. Hopkins' letter corroborates Plaintiff's sworn interrogatory responses that the prior statements she gave Farm Bureau were under oath. Hopkins' letter asked Farm Bureau to provide him with authority that granted Farm Bureau the right to obtain "three sworn statements from their insureds"; and

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[2] Farm Bureau attempted to rectify this error by filing a *Notice of Substitution and Filing Regarding Exhibits* with the Trial Court on November 16, 2009 – more than a month after the Summary Judgment Hearing. Farm Bureau also asserted the signed version of the Affidavit was presented to Plaintiff's Counsel in May, 2008, however the alleged attachment to the letter to Plaintiff's Counsel is not included in the Record. R 782-788

requested Farm Bureau provide him with "a copy of the transcripts of both statements under oath that have already been taken by Farm Bureau." Hopkins noted Plaintiff had "complied with the policy language", and that "it has been over three months since the date of this loss." Hopkins requested Farm Bureau provide him with policy language and authority the requests in Farm Bureau's letter dated May 29, 2008 in light of these circumstances, and concluded by assuring Farm Bureau "the Mullens will continue in good faith to cooperate with Farm Bureau", and that "[i]f 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 131-132; R 602-603 Plaintiff also provided the Court with the Affidavit of Hopkins, wherein Hopkins swore his office "prepared and mailed" the referenced letter to Chris Deaton "on June 24, 2008". RE 124-127; R 595-598, ¶ 4

6. September 11, 2008: Farm Bureau Denied Plaintiff's Claim Without Responding to Plaintiff's Lawyer's Letter of Representation and Request for Information

Deaton's unsigned affidavit asserts his office sent a letter to Hopkins, "dated July 2, 2008", wherein he allegedly advised Hopkins that Plaintiff and her Husband had not given any "statements under oath", and allegedly provided a copy of a single transcribed statement that had been given by each; and wherein he allegedly requested Mr. Hopkins provide dates on which each of the Mullens would be available to give statements under oath, or advise Farm Bureau that he did not intend to make the Mullens available for further statements. R 221-223, ¶ 7; R 224-225 Again, no evidence was provided by Farm Bureau about when the letter was actually sent, Deaton's unsigned affidavit merely asserts the referenced letter is "a true, authentic and accurate copy of correspondence my office sent to Hopkins, dated July 2, 2008." R 222 Conversely, Hopkins swears he never received any correspondence from Farm Bureau, following his submission of a letter of representation and request for information / offer to

cooperate on June 24, 2008, until he received a copy of Farm Bureau's September 11, 2008 letter denying Plaintiff's claim, on September 12, 2008; and that he did not receive the alleged letter dated September 2, 2009. RE 124-127; R 595-598, ¶¶ 6, 7, 9, 10, 12 and 13

Deaton's unsigned affidavit also asserts his office sent a letter to Hopkins, "dated August 6, 2008", wherein he allegedly advised Hopkins that if he did not hear from Hopkins regarding available dates for the Plaintiff and her husband to provide him with statements under oath within the next two weeks, Farm Bureau would close its file. R 221-223, ¶ 8; R 226 Again, no evidence was provided by Farm Bureau about when the letter was actually sent. Deaton's unsigned affidavit merely asserts the referenced letter is "a true, authentic and accurate copy of correspondence my office sent to Hopkins, dated August 6, 2008." R 222 Hopkins' affidavit affirms Hopkins never received any correspondence from Farm Bureau, following submission of a letter of representation and request for information / offer to cooperate on June 24, 2008, until he received Farm Bureau's September 11, 2008 letter denying Plaintiff's claim; and that he did **not** receive the alleged letter dated August 6, 2008. RE 124-127; R 595-598, ¶¶ 6-7, 9, 10-13 Hopkins' affidavit also establishes that, although he requested Farm Bureau provide him with the transcripts of the two sworn statements Plaintiff gave prior to his representation on June 24, 2008, Farm Bureau did not provide alleged transcripts of those two statements until almost a year later, when they were submitted with Farm Bureau's responses to Plaintiff's discovery requests in this litigation. RE 124-127; R 595-598, ¶ 5

Upon receipt of Farm Bureau's denial letter on September 12, 2008, Hopkins sent Deaton a letter on September 19, 2008, advising Deaton that neither Hopkins nor the Plaintiff received any communication or correspondence from Farm Bureau after Hopkins sent his June 24, 2008 letter of representation, until Hopkins received Farm Bureau's September 11, 2008 denial letter.

RE 124-127, R 595-598, ¶ 7; RE 135-136, R 606-607 Hopkins reiterated that the Plaintiff and her husband "remain willing to cooperate with Farm Bureau", and again requested that Farm Bureau provide him with the transcripts of Plaintiff's prior statements. RE 135; R 606

On September 24, 2008, Hopkins received a response to his September 19, 2008 letter, in the form of a letter from Deaton dated September 22, 2008. RE 124-127, R 595-598, ¶ 8; RE 137, R 608 Therein, Deaton allegedly provided copies of his alleged letters dated July 2 and August 6, 2008, and confirmed no effort had been made to correspond directly with the Plaintiffs since Farm Bureau was advised of Hopkins' representation. RE 137; R 608 Although Hopkins' September 19, 2008 letter again clarified Plaintiff's willingness to cooperate with Farm Bureau's investigation, Deaton's letter did not request further statements or any other information from the Plaintiff. Deaton simply advised Hopkins his letter had been forwarded to Farm Bureau, and that he would advise Hopkins "should Farm Bureau wish to discuss these matters further." *Id.*

On October 1, 2008, Hopkins received a letter from Deaton dated September 29, 2008. RE 124-127, R 595-598, ¶ 9; RE 138, R 609 This correspondence was limited to a single question – was it Hopkins' position he did not receive Deaton's alleged letters dated July 2 or August 6, 2008? RE 138; R 609 On October 1, 2008, Hopkins again expressly advised Deaton he did <u>not</u> receive Deaton's alleged letters dated July 2 or August 6, 2008, but that he only received the September 11, 20089 denial letter. RE 124-127, R 595-598, ¶ 9; RE 139, R 610 On October 3, 2008, Hopkins received correspondence from Deaton confirming Deaton's receipt of Hopkins October 1, 2008 letter, and advising Hopkins he had forwarded same to Farm Bureau. RE 124-127, R 595-598, ¶ 11; RE 140, R 611

Hopkins' affidavit concludes:

> Despite the facts I advised Farm Bureau that neither I nor my clients ever received any correspondence, communications or further requests for information

> from Farm Bureau after my letter of representation and request information dated June 24, 2008, until I received the September 11, 2008 denial letter, and that I expressly advised Farm Bureau in my letters of June 24, 2008 and September 19, 2008 that my clients were ready and willing to cooperate with reasonable requests for additional information made in compliance with the subject policy of insurance; Farm Bureau never made any attempt to request additional information from its insureds after it sent the denial of coverage letter dated September 11, 2008.
>
> Mrs. Mullen could not have "refused to cooperate" with Farm Bureau, as no requests for cooperation or additional information were ever made by Farm Bureau after I sent my letter of representation and requesting information dated June 24, 2008; rather, Farm Bureau simply denied the claim.

RE 124-127; R 595-598, ¶¶ 12-13 Plaintiff provided the Court with her sworn response to Interrogatory 16, which corroborate Hopkins' affidavit, where Plaintiff affirmed she did not receive any requests from Farm Bureau to provide additional information after Hopkins sent Farm Bureau his letter of representation dated June 24, 2008, but that the next contact received from Farm Bureau was the September 11, 2008 letter denying Plaintiff's claims. R 620 The facts are undisputed that, after Plaintiff gave her second sworn statement on April 17, 2008, Farm Bureau never directed the Plaintiff to appear for an examination under oath, or to produce copies of specified documents, at any specific time and place.

II. SUMMARY OF THE ARGUMENT

The Trial Court erroneously adopted, substantially verbatim, *Findings of Fact and Conclusions of Law* submitted by Farm Bureau. In so doing, the Trial Court made numerous "findings" of allegedly "undisputed fact" that are contrary to the Record; construed evidence in favor of the Movant, Farm Bureau, instead of the Non Movant Plaintiff; and made erroneous conclusions of law that were expressly based on those erroneous factual "findings". The Trial Court also committed error by considering exhibits presented by Farm Bureau for the first time at the Hearing of this matter, which exhibits were not proper summary judgment evidence. Ultimately, the *Findings of Fact and Conclusions of Law* and *Judgment* entered by the Trial

Court must be reversed because Plaintiff came forward with appropriate summary judgment evidence that demonstrated the existence of numerous, genuine issues of material fact which mandated denial of Farm Bureau's Motion for Summary Judgment and resolution of the issues by a Jury in this cause.

III. ARGUMENT

A. Standard of Review

This Court reviews the Trial Court's grant of a motion for summary judgment under a *de novo* standard. *Pride Oil Co. v. Tommy Brooks Oil Co.*, 761 So.2d 187, 190 (Miss. 2000). "The moving party has the burden of demonstrating that no genuine issue of material fact exists, and the non-moving part must be given the benefit of the doubt concerning the existence of a material fact." *Hosey v. Mediamolle*, 963 So.2d 1267, 1269 (Miss.Ct.App. 2007) In considering the issues raised by this appeal, this Honorable Court must "examine all the evidentiary matters before [it], including admissions in pleadings, answers to interrogatories, . . . and affidavits." *Wilner vs. White*, 929 So.2d 315, ¶ 3 (Miss. 2006). "The evidence must be viewed in the light most favorable to the party against whom the motion has been made." *Id.* "Where there is the slightest doubt over whether a factual issue exists, the court should resolve [the questions] in favor of the non-moving party." *Rein v. Benchmark Constr. Co.*, 865 So.2d 1134, 1142 (Miss. 2004). "Motions for summary judgment are to be viewed with a skeptical eye. . ." *PDN, Inc. v. Loring*, 843 So.2d 685, 688 (Miss. 2003). "Issues of fact sufficient to require a denial of a motion for summary judgment are obviously present where one party swears to one version of the matter in issue and another party takes the opposite position." *Wilner*, 929 So.2d 315 at ¶ 3.

Although this summary judgment issue already requires a *de novo* review, it should be noted that where, as here, the Trial Judge

> . . . sitting as the finder of fact adopts verbatim one party's findings of fact and conclusions of law, those factual findings, while still entitled to deference, are subjected to heightened scrutiny. Where a trial judge adopts one party's findings of fact and conclusions of law verbatim "[t]hese findings simply are not the same as findings independently made by the trial judge after impartially and judiciously sifting through the conflicts and nuances of the trial testimony and exhibits."

City of Jackson vs. Presley, 40 So.3d 520, ¶ 10 (Miss. 2010) (citations omitted). To exercise the requisite "heightened scrutiny", this Court "must view the challenged findings and record as a whole 'with a more critical eye to ensure the Court has adequately performed its judicial function.'" *Joel vs. Joel*, 43 So.3d 424, ¶ 17 (Miss. 2010) (citations omitted). The requisite heightened review also applies when the Trial Court's findings are "substantially verbatim" to those submitted by the prevailing party. See, eg. *Miss. Dept. of Wildlife, Fisheries and Parks vs. Brannon*, 943 So.2d 53, ¶¶ 15-16 (Miss.Ct.App. 2006) (citations omitted).

B. The Trial Court Did Not Resolve Disputed Issues of Fact in Favor of the Plaintiff

The Trial Court's Findings, Conclusions and Judgment should be reversed and rendered and/or reversed and remanded because the Trial Court's rulings are based on "findings" in which the Trial Court did not resolve issues of disputed fact in favor of the Plaintiff. *Rein* 865 So.2d at 1142. By adopting a substantially verbatim version of *Farm Bureau's Proposed Findings of Fact and Conclusions of Law*, the Trial Court made numerous "findings" that are erroneous because they are contrary to the evidence and/or disputed facts in the Record.

In its introductory paragraph, the Trial Court set forth an erroneous "finding" that formed the basis of virtually all of the Trial Court's rulings in this cause:

> *Without having submitted to an examination under oath concerning a fire loss and without having supplied financial information requested by Farm Bureau, Brenda Mullen sued Farm Bureau seeking full coverage and alleging bad faith.*

RE 5, R 799 (emphasis added) The Trial Court erroneously concluded, in response to Farm Bureau's Motion for Summary Judgment, that Plaintiff did not submit to an examination under oath. This

"finding" is contrary to the sworn interrogatory responses of the Plaintiff, wherein she repeatedly swore she gave two statements under oath to Farm Bureau. RE 113-123, R 1065-1107 Farm Bureau will argue the "transcripts" it produced to the Plaintiff in response to Plaintiff's Requests for Production reveal, on their face, that these "recorded statements" were not under oath.

The mere fact the particular documents produced by Farm Bureau, without any sponsoring witness or affidavit to affirm their authenticity, do not reflect express evidence the statements were given under oath does not disprove Plaintiff's sworn interrogatory responses that she understood and believed these statements ***were*** under oath. Even if Farm Bureau had produced an affidavit purportedly affirming the "transcripts" produced by Farm Bureau are authentic, complete recordings of all that transpired on each of the occasions Plaintiff and her Husband voluntarily appeared and provided statements requested by Farm Bureau, material questions of fact would remain for resolution by the Jury in this cause. In light of Plaintiff's sworn interrogatory responses, a Jury in this cause could conclude, for instance, that Plaintiff and her husband *were* placed under oath in connection with these statements, but that Farm Bureau negligently, grossly negligently and/or intentionally manufactured "transcripts" that did not include these facts; and/or produced modified "transcripts" that deleted reference to same. Likewise, a Jury could conclude Plaintiff did not fail to comply with the policy requirement her "statement under oath" be signed (RE 29, R 198), simply because Farm Bureau chose not to make the transcripts available for her to do so. Hopkins' affidavit, and "Exhibit B" incorporated therein, confirm Hopkins requested Farm Bureau provide him with "a copy of the transcript of both statements under oath that have already been taken by Farm Bureau"; and that "Farm Bureau did not provide transcripts of the two statements Mrs. Mullen had previously given until almost a full year later with their responses to Plaintiff's discovery in this litigation, on or about June 5, 2009." RE 124-125, R

595-596 ¶¶ 4-5; RE 131-132, R 602-603.

Next, the Trial Court found "[t]he following facts are uncontradicted in the record before the Court and form the basis of this decision." RE 5, R 799 Those asserted to be "uncontradicted" "facts" include numerous findings that are contradicted in the Record, and which the Trial Court was bound to resolve in favor of the Plaintiff. The "facts" the Trial Court erroneously found are "uncontradicted", which the Trial Court erroneously resolved in favor of Farm Bureau instead of the Plaintiff (the party opposing this Motion for Summary Judgment); and which "form the basis" for the Court's erroneous rulings, include:[3]

> *On April 3, 2008, Brenda and Gene Mullen gave recorded statements to a Farm Bureau adjuster.* RE 7, R 801

The Trial Court erroneously refers to these statements as "recorded statements". In light of the Plaintiff's sworn interrogatory responses that both of the statements she and her husband gave Farm Bureau *were* under oath (RE 113-123, R 1065-1107), the Trial Court was required to resolve this factual dispute in favor of the Plaintiff, and rule for the purposes of this Summary Judgment Motion that Plaintiff's April 3, 2008 statement was given under oath. *Rein* 865 So.2d at 1142.

> *On April 3, 2008, Brenda Mullen signed a release allowing Farm Bureau to obtain financial information regarding her bank accounts and credit accounts. No financial information or listing of accounts was supplied along with it.* RE 7, R 801

The Trial Judge's finding that "no financial information or listing of accounts was supplied" along with the Plaintiff's executed *Release of Financial Information* fails to construe the facts in the light most favorable to the Plaintiff, as required by law; and instead skews the facts in the favor of Farm Bureau. The Record clearly establishes the *Release of Financial Information* supplied by Farm Bureau was promptly and voluntarily signed by the Plaintiff. RE 39, R 497. The Record also

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[3] The Trial Court's erroneous consideration of improper summary judgment evidence in the course of those findings is addressed separately, *infra.*

establishes the form *Release* provided by Farm Bureau did not request Plaintiff to supply any financial information or listing of accounts; and that Plaintiff and her non-insured husband each voluntarily submitted to a sworn statement under oath on the same date she executed the *Release*, and answered all of the questions asked by Farm Bureau. RE 30-36, R 509-515; RE 41-48, R 501-508 Farm Bureau could have, but did not ask Plaintiff or her husband to provide any financial information or listing of accounts according to the purported transcripts, however Farm Bureau did ask for, and Plaintiff did identify the mortgage company on the insured dwelling and identified the mortgage company on her primary residence. RE 31, R 510 Plaintiff's Husband also provided the balance owed on the mortgage for the insured dwelling. RE 503, R 503.

> *The Mullens gave further recorded statements on April 17, 2008,[FN 2] . . . [FN 2] Despite Plaintiff's consistent reference to the Mullens' recorded statements as being "sworn" or "under oath", it is clear that they were not.* RE 8, R 802

Through footnote 2, the Trial Court flatly rejected Plaintiff's sworn interrogatory responses. In light of Plaintiff's sworn interrogatory responses that both of the statements she and her husband gave Farm Bureau *were* under oath (RE 113-123, R 1065-1107), the Trial Court was required to resolve this factual dispute in favor of the Plaintiff, and rule for the purposes of this Summary Judgment Motion that the April 17, 2008 statements were given under oath, or at the very least that a Jury could conclude same. *Rein* 865 So.2d at 1142

> *Following these three recorded statements, the additional information presented to Farm Bureau was as follows:*[4] RE 8, R 802
>
> - *No flammable liquids were stored in the master bathroom, master bathroom closet, or master bedroom. Some charcoal lighter may have been stored in the utility room.* RE 9, R 803

These findings fail to construe the facts in the light most favorable to the Plaintiff, as required by law,

[4] Note: the Trial Court set out the "additional information" he found was presented with bullet point paragraphs, see RE 8-10, thus the bullets below are quotations of the Trial Court's bulleted Findings.

and instead skew the facts in the favor of Farm Bureau. In Plaintiff's 4/17/08 statement under oath, she confirmed there may have been a can of wasp spray in the home; that they had a Coleman lantern, that at one time they kept cans of lantern fuel at the home, and that the cans of fuel may have been there at the time of the fire. RE 63-64; R 528, 529 In Plaintiff's Husband's 4/17/08 statement under oath, he revealed there would probably have been some charcoal lighter fluid in the house, but that he did not know for certain if there was any there at time, and confirmed that there has never been any gasoline or diesel in home. RE 100, R 565 He ultimately affirmed he just was not sure what flammable liquids were in the house at the time of the fire. RE 101, R 566. The Trial Court's finding of "undisputed fact" that there were no flammable liquids "stored in the master bathroom, master bathroom closet, or master bedroom" has zero support in the Record, and his exclusion of Plaintiff's revelations about cans of Coleman lamp fuel having been kept in the home is contrary to the Record, and skews the facts in favor of Farm Bureau.

- *There was a mortgage on the Falkner property with First South Bank and a mortgage on the Walnut house with Countrywide. No loan or account numbers or the addresses at which payments were made was (sic) provided. The outstanding amounts and payment amounts given were estimated. The Mullens had not made the April 12 payment on the Falkner house after the fire.* RE 9, R 803
- *The Mullens had a checking account with Regions Bank but no savings account. No checking account number was provided.* RE 9, R 803
- *The Mullens had a Visa and a Sears Mastercard. No issuing bank information was provided for the Visa. No account number or address information was provided for either . . . .* RE 9, R 803
- *The Mullens owned several vehicles and a camper. The vehicles were financed through various companies such as GMAC, Trustmark, Ford Motor Credit, and Automobile Financing. No loan or account numbers regarding these lenders were provided, and no lender for the camper was provided.* RE 9, R 803
- *A&B had heavy equipment which was financed through John Deere. Loan or account numbers were not provided.* RE 9, R 803

Again, these findings are steeply skewed in Farm Bureau's favor. The Record reveals that, after promptly and voluntarily signing a *Release of Financial Information* that gave Farm Bureau

unfettered access to have *ex parte* contact with any and all financial entities, and which required all such entities to "release to [Farm Bureau] **copies** of any and all financial information in the possession of said institution(s)" (RE 7, R 969), Plaintiff and her husband voluntarily appeared and gave Farm Bureau two statements under oath, during which they provided all of the financial information requested by Farm Bureau. RE 30-36, R 509-515; RE 41-48, R 501-508. The financial information that *was* requested by Farm Bureau, and that was provided by the Plaintiff and/or her Husband, was voluminous. The information voluntarily provided by Plaintiff and her husband included, but was not limited to, identification of social security numbers and other personal identifiers for Plaintiff and her husband; and identification of all mortgages, loans, balances, payment amounts and expenses of Plaintiff, her husband, and their business, *supra.*

- *The Mullens had a previous fire loss to another house. After the loss their insurer, State Farm, no longer wanted dealings with them. Mrs. Mullen did not know why.* RE 9, R 803

Again, the Trial Court's allegedly "undisputed" "findings" erroneously skew the facts in favor of Farm Bureau. Plaintiff actually explained State Farm canceled her insurance after she made a claim (and colloquially said "they didn't want no more dealings"). Plaintiff went on to explain "but they say they're bad about if you have kind of claim they're gona (sic) cancel you out." RE 72, R 537.

- *Brenda Mullen indicated there was a judgment and lien against the Falkner house as a result of an auto title dispute, and it would have to be paid if the house were sold. Mr. Mullen indicated they had no judgments or liens.* RE 10, R 804

These allegedly "undisputed" "findings" are completely contrary to the Record. In response to a follow up question about whether there were any "mechanic's liens or carpenter liens", wherein the interviewer asked Plaintiff if there were any situations where "somebody claiming you owe money that you say you don't owe", Plaintiff identified a lien on the insured dwelling by Gulf Coast Bank related to a lost title on an automobile, and explained the circumstances, amount, and

unenforceability of that lien RE 78-79, R 543-544. Contrary to the Trial Court's "finding" that "Mr. Mullen indicated they had no judgments or liens", the Record reveals Mr. Mullen was not asked whether there were any judgments against them (RE41-48, R 501-508; RE 86-112, R 551-577); and that the only question asked of Mr. Mullen about "liens" was whether he had "any tax liens against any of [his] property". RE 107, R 572

- *The Falkner house was not formally for sale before the fire. However, the Mullens had offered to sell it to people who inquired about it, although no one had agreed to their asking price for the house.* RE 10, R 804

These "findings", which give the impression the Plaintiff and her husband would have liked to sell the insured dwelling, misconstrue the Record in Farm Bureau's favor. Mr. Mullen testified his daughter called the house "her house", and that the house would have been his daughter's house – he expected she would live in it after she got married, so she could stay close to home. RE 94, R 559. Mr. Mullen also explained they were **not** trying to sell the house, but that they had a lot of people ask about it; and that when people would ask him about the house, he would give them an "off the wall price and if they wanted to pay it they could". He identified a recent inquiry and off the wall asking price, and explained there were a lot of prospective buyers who would have bought the house if Mr. Mullen would have financed it for them – **but that he was saving the home for his daughter** RE 101-102, R 566-567.

Plaintiff also notes that, if the Trial Court intended to base its ruling in part on what "additional information was presented to Farm Bureau" in relation the April 17, 2008 sworn statements of Plaintiff and her Husband and the May 7, 2008 statement of Chief Rutherford, as documented in the Trial Court's *Findings* (RE 8, R 802), the Trial Court also erred by omitting voluminous information provided in Plaintiffs' sworn statements that are contrary to Farm Bureau's position, including the vast amount of financial information voluntarily provided by the

Plaintiff noted above. The Trial Court skewed facts in favor of Farm Bureau by repeatedly finding Plaintiff did "not provide" information the Record proves Farm Bureau never requested.

> *On May 29, 2008, Deaton wrote to Brenda Mullen, requesting that she contact him to arrange to appear for an examination under oath* . . . . RE 10, R 804

This finding is not supported by the Record. Deaton's affidavit does not affirm what day *any* of the letters he allegedly sent to Plaintiff and/or her attorney were actually mailed, rather Deaton merely asserts letters were sent, and that the sent letters were "dated []". R 221-223

> *On June 8, 2008, Deaton's office received a call from a person claiming to be Gene Mullen. Mr. Mullen spoke to Deaton's secretary, inquired why Farm Bureau needed personal information about Mrs. Mullen, and stated that Farm Bureau did not have a right to the documents requested in Deaton's May 29 letter. Finally, Mr. Mullen indicated Mrs. Mullen would be contacting an attorney.* RE 10, R 804

There is no summary judgment appropriate evidence in the Record to support this finding. The affidavit of Deaton, even if it were subsequently permissibly signed and substituted, does not assert Deaton has any personal knowledge of the alleged telephone call from Plaintiff's husband. Rather, the unsigned affidavit merely asserts hearsay that Deaton's Secretary, Julie Repult, allegedly spoke with a man identifying himself as the Plaintiff's Husband on June 8, 2008. R 221-223, ¶ 11 The Trial Court erroneously adopted this hearsay as "undisputed fact", and multiplied its error by converting Deaton's hearsay assertion, that someone "claiming to be Gene Mullen" called, to a "finding" of "undisputed fact" that the alleged caller was, in fact, Gene Mullen.

> *Deaton then wrote Mrs. Mullen on June 13, outlining her legal duties* . . . RE 10, R 804

Again, Deaton's affidavit does not establish when this letter was actually sent. R 221-223 The Trial Court also failed to construe the facts in favor of the Plaintiff, by failing to acknowledge or accept Plaintiff's sworn interrogatory responses that she had no recollection of receiving any correspondence during this time frame. RE 113-123, R 1065-1107

> *On July 2, Deaton wrote to Hopkins supplying him with a copy of the Farm Bureau policy and the previous recorded statements . . . . Hopkins states he did not receive this letter, although he acknowledges there was no error in address.* RE 11, R 805
>
> *Having had no response, Deaton wrote to Hopkins on August 6, 2008, again asking for dates for the examination under oath . . . . Hopkins states he did not receive this letter, although he acknowledges there was no error in address.* RE 12, R 806
>
> *Again having had no response [to his July 2 or August 6 letters], Deaton wrote to Mrs. Mullen on September 11, 2008 [denying her claim].* RE 12, R 806

Each of these findings constitutes reversible error, because the Trial Court clearly resolved hotly contested issues of fact in favor of Farm Bureau. First, Deaton's affidavit does not establish when these alleged letters were sent. R 221-223 More importantly, Hopkins does not merely "state" he did not receive these letters, he swore to it in a duly executed Affidavit presented to the Trial Court. RE 124-140, R 595-611. Recall that these "findings" are set out as "facts [that] are uncontradicted in the record before the Court and form the basis for this decision." RE 5, R 799. In light of Hopkins' affidavit, and the Plaintiff's interrogatory responses, the Trial Court was required to find that neither Hopkins nor the Plaintiff received the alleged July 2 and August 6, 2008 letters. By finding that Deaton's subsequent letters were in fact mailed, and that they were sent after Deaton had "no response" to his prior letter(s), the Trial Court erroneously resolved some of the most hotly contested issues of fact in this litigation in favor of the Movant for summary judgment, mandating reversal.

> *Mr. Hopkins then sent a letter to Deaton on September 19, 2008. Hopkins referred to Deaton's letter of September 11 and stated [that letter was the only contact he had from Farm Bureau]. Hopkins sated he did not have copies of his client's prior statements, "whether sworn or unsworn".[FN 3] . . . [FN 3] The Court notes that, although Mr. Hopkins states he did not receive Deaton's July 2 letter, it was that letter in which Deaton informed Mr. Hopkins that the previous statements were not sworn. . . . . Although the letter stated that Mullens intended to abide by the terms of the policy, the letter contained no offer to submit to an examination under oath or to produce requested financial information at any proposed date or time. . . .* RE 12, R 806

Through footnote 3, the Trial Court implicitly suggested Hopkins September 19, 2008 letter reveals

he is not telling the truth when he affirms he did not receive Deaton's alleged July 2, 2008 letter. This "finding", which suggests the only way Hopkins could have known there was a dispute about whether the Plaintiffs' prior two statements were "sworn" was if he received the purported July 2, 2008 letter, ignores the fact the September 11, 2008 denial letter – which Hopkins did get – avers the Plaintiff failed to submit to an examination under oath. The Trial Court's closing finding that "the letter contained no offer to submit to an examination under oath or to produce requested financial records at any proposed date or time" also erroneously skewed the facts in Farm Bureau's favor.

In light of Hopkins' Affidavit, Plaintiff's Interrogatory Responses, and the letters and purported letters from Farm Bureau, as discussed above, the Trial Court *should* have found (1) Plaintiff and her husband promptly and voluntarily provided Farm Bureau with two statements (each) under oath, although Farm Bureau alleges they were not under oath; (2) Plaintiff promptly and voluntarily executed all of the forms Farm Bureau requested, including a sworn statement under oath and a *Release of Financial Information* that gave Farm Bureau complete and unfettered access to obtain copies of any and all financial records of the Plaintiff; (3) When Farm Bureau asked the Plaintiff to submit to a third statement, under oath, and to supply numerous records that would have clearly required Plaintiff to expend substantial time and expense to acquire, Plaintiff retained counsel; (4) Hopkins promptly asked Farm Bureau to provide transcripts of the two statements under oath already given by the Plaintiff, and assured Farm Bureau that Plaintiff would fully cooperate with any and all reasonable requests for information supported by the facts and policy; (5) Farm Bureau failed to present any summary judgment appropriate evidence that the fire was suspicious or incendiary, rather all of the evidence in Farm Bureau's claim file indicated the fire was accidental and caused a total loss of the insured dwelling and everything in it; (6) Rather than respond to Hopkins' reasonable requests for information, Farm Bureau denied the Plaintiff's claim without any further

communication with the Plaintiff or her lawyer, although Farm Bureau disputes Hopkins' claims he received no further requests for information from Farm Bureau; (7) After Farm Bureau was advised neither Plaintiff nor her lawyer received any communication from it between the date of Hopkins' letter of representation and the date the claim was denied, and that Plaintiff continued to be willing to cooperate with reasonable requests for information supported by the facts and policy, Farm Bureau made no effort to supply the information requested by Hopkins or seek further information from the Plaintiff; (8) Farm Bureau never provided the Plaintiff or her lawyer with a specific time and place at which Plaintiff was requested to give another statement under oath and/or provide financial documents; and (9) Farm Bureau refused to provide the transcripts requested by Plaintiff's lawyer, and did not produce purported transcripts of the Plaintiff and her Husband's two prior statements each until responding to Plaintiff's discovery requests in this litigation; and (10) Farm Bureau failed to make any reasonable effort to complete its investigation within 60 days of requesting and receiving Plaintiff's Sworn Statement Proof of Loss, which it was bound to do under its contract and Mississippi law; (11) Plaintiff could not have 'refused to cooperate' with Farm Bureau, as no requests for cooperation or additional information were ever made by Farm Bureau after [Hopkins] sent [his] letter of representation and requesting information dated June 24, 2008; and (12) The existence of numerous disputed issues of genuine fact preclude summary judgment. Such findings are consistent with the Record, and Plaintiff's proposed Findings of Fact and Conclusions of Law. R 1286-1310

C. Plaintiff's Motion to Strike Improper Summary Judgment Evidence Should Have Been Granted

The Trial Court's "findings" of allegedly undisputed fact, upon which its rulings were based, that an adjuster from Farm Bureau's Special Investigative Unit (Welch) inspected the fire premises on April 4, 2008, that he noted an odor of "possible ignitable fluid" in the debris; that he took samples from the debris; and that Farm Bureau was issued a report by an "independent

laboratory" on April 10, 2009 concluding the presence of "evaporated heavy petroleum distillates". RE 7-8, R 801-802. The Court also "found" that Welch submitted a report to Farm Bureau on May 14, 2008 concluding the fire was incendiary in nature. RE 10, R 804.

Farm Bureau sought to introduce the "exhibits" on which these "findings" are based, an alleged "Analytical Forensic Associates Test" and alleged "SIU Report", during the Hearing on October 14, 2009, which exhibits Counsel for Farm Bureau acknowledged "I have not produced [to the Plaintiff]". RE 141, T 21 Counsel for Plaintiff objected to admission of these exhibits, arguing the alleged Analytical Forensic Associates Report is improper summary judgment evidence, as it was offered without a sponsoring witness or sponsoring affidavit; and that the alleged SIU Report, which was also offered without a sponsoring witness or affidavit, did not even bear the alleged signature of the alleged investigator. RE 142-143; T 22-23 Counsel for Plaintiff also pointed out that neither exhibit was attached to the Summary Judgment Motion [or Rebuttal, despite the fact Plaintiff pointed out the lack of such evidence in her Response], and neither document was produced or identified (on a privilege log) in response to Plaintiff's Interrogatories and Requests for Production. *Id.* Counsel for Plaintiff also pointed out that the proffered exhibits were not produced as part of what was produced by Farm Bureau as the claims file, and that they were not identified on any privilege log supplied by Farm Bureau. RE 143; T 23 These facts are undisputed. Counsel for Plaintiff requested the Court strike and disregard the exhibits and argument of counsel regarding same because there was no proper summary judgment evidence before the Court. *Id.*

The Trial Court reserved ruling on the Plaintiff's objection / Motion to Strike. *Id.* The Table of Contents of the Court Reporter's Transcript, prepared in compliance with M.R.A.P. 11(c), reveals the Court did not admit either of the proffered exhibits into evidence, but that they

were merely marked for identification. T, Table of Contents In adopting *Farm Bureau's Findings of Fact and Conclusions of Law*, however, the Trial Court erroneously considered this improper summary judgment evidence.

The standards governing what evidence is admissible in the context of a summary judgment motion are set by the Mississippi Rules of Civil Procedure. As observed by the Mississippi Court of Appeals, M.R.C.P. 56 provides summary judgment evidence:

> . . . may be in the form of depositions, admissions, answers to interrogatories, or affidavits. M.R.C.P. 56(c). Where affidavits are offered, they must be based upon personal knowledge, and "set forth such facts as would be admissible in evidence." M.R.C.P. 56(e).

Lowery vs. Harrison County Board of Supervisors, 891 So.2d 264, ¶ 7 (Miss.Ct.App. 2004). The proffered, alleged "Analytical Forensic Associates Test" and alleged "SIU Report" do not fall within any of the requisite categories to be considered summary judgment evidence, and it was error for the Trial Court to consider said exhibits, and to use them as part of the "basis for the Court's decision." RE 5, R 799; RE 7-8, R 801-802

The Trial Court addressed its consideration of this improper evidence in footnote 1, drafted by Farm Bureau. First, the Trial Court erroneously found

> [t]he exhibit[s] consisted of a portion of the Farm Bureau claim file documents that were subject to a motion for protective order by Farm Bureau on which the Court had not yet ruled.

RE 8, R 802 [fn 1] There is no basis in the Record for this finding. Farm Bureau's *Second Motion for Protective Order*, the only such pleading pending at the time, did not assert a right to protect claim file documents. R 273-277. Rather, it admitted Farm Bureau had not alleged the Plaintiff, or someone acting on her behalf, intentionally burned the dwelling (R 274, ¶ 5); and set forth those categories of documents on which it sought protection. R 275, ¶ 6. Farm Bureau's "claim file" materials were *not* listed (*Id.*); and in fact Farm Bureau's Responses to Plaintiff's

Requests for Production purportedly identified and produced the subject claims file. R 839-840. No privilege log was produced with Farm Bureau's discovery responses or protective order.

The Trial Court went on to assert the exhibits were not considered "for the truth of the matter asserted", but for "demonstration of the information possessed by Farm Bureau when it requested that Mrs. Mullen submit to an examination under oath and produced financial records." RE 8, R 802, [FN 1] Contrary to the Trial Court's Ruling, the "truth" Farm Bureau attempted to assert, and which the Trial Court erroneously found as fact as noted above, was that Farm Bureau allegedly had knowledge the fire was incendiary in nature on April 4 and/or April 10, 2010. The Trial Court's conclusion there is "no requirement in the relevant Farm Bureau Policy language or Mississippi law that Farm Bureau possess evidence of incendiary origin . . . before requesting . . . examination under oath or produc[tion] of financial records" (*Id.*) was also error, as demonstrated *infra.*

D. Plaintiff Demonstrated The Existence of Disputed Issues of Material Fact

1. A Jury Could Conclude Plaintiff Satisfied Her Obligations Under the Policy

The Farm Bureau policy has a clause, present in many fire policies in Mississippi, that required the Plaintiff to (1) Show the damaged property; (2) Provide Farm Bureau with records and documents it requests; and permit Farm Bureau to make copies; and (3) Submit to examination under oath, while not in the presence of any other "insured", and sign the same; as often as *reasonably* required by Farm Bureau. RE 29, R 198 The sole basis Farm Bureau asserted for its denial of Plaintiff's claim was that Plaintiff allegedly "failed to submit to the examination under oath." RE 134, R 605

As an initial matter, the Trial Court erred in considering Farm Bureau's argument the Plaintiff violated her policy by allegedly failing to provide financial information; and in basing its

decision on an alleged ground for denial not included in Farm Bureau's denial letter. In its Motion for Summary Judgment, Farm Bureau alleged Plaintiff "refused to sit for an examination under oath", and alleged, for the first time, the Plaintiff refused to "*produce requested financial information . . . .*" R 169, ¶ 1 The Trial Court considered, and based its decision upon both of these alleged grounds. RE 5-22, R 799-816. The specific issue of whether an insurance company can "mend its hold" once it gets before the Court, that is, argue some totally new reason supports it denial of the claim than that given to the insured, has not yet been fully addressed by this Court. This Court has noted, however, that a party ***could*** make a convincing argument an insurer should **not** be allowed to "mend its hold". In *Bankers Life and Cas. Co. vs. Crenshaw*, after noting the insurance company's failure to conduct an adequate investigation, this Court observed "Crenshaw could argue **with some cogency** Bankers Life should have been estopped to assert this variant defense for the first time at trial". 483 So.2d 254, 273 (Miss. 1985) (emphasis added).

This Court's observation in *Crenshaw* is consistent with one of the older doctrines in the land. The United States Supreme Court, in 1877, established what became known as the "Mend the Hold" doctrine:

> . . . where a party gives the reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and different consideration. He is not permitted to mend his hold.

Ohio & M.R. Co. v. McCarthy, 96 U.S. 258, 266-267 (1877). The Seventh Circuit observed this doctrine persisted as "a substantive doctrine especially applicable to insurance companies that change their reason for refusing to pay a claim;" and held

> [a] party who hokes up a phony defense to the performance of his contractual duties and then when that defense fails (at some expense to the other party) tries on another defense for size can properly be said to be acting in bad faith.

Harbor Insurance Company v. Continental Bank Corporation, 922 F.2d 357, 363 (7th Cir. 1990).

In finding the "mend the hold" doctrine alive and well, the 7th Circuit placed particular emphasis on the issue of whether the attempt to change positions was based on evidence not previously available to the party against whom the doctrine is asserted, or whether the party was merely trying to change positions because it realized its original defense was without merit. *Id.* at 364-365. In the case at bar, the evidence is undisputed Farm Bureau did not base its "records defense" on any information not available when it denied the claim on September 11, 2008.

Even if the Court's consideration of a new basis for denial not communicated to the insured was not error under the circumstances in this case, however, the Trial Court's *Findings* and *Judgment* must be reversed because Plaintiff presented sufficient evidence from which a Jury could conclude Plaintiff *did* comply with the cooperation requirements of the policy. As discussed in great detail above, Plaintiff presented the Court with sworn interrogatory responses that she gave *two* statements under oath to Farm Bureau, and the affidavit of Hopkins that Farm Bureau refused to produce the transcripts of those statements for Plaintiff's review (or signature).

The Trial Court's alignment of this case with the facts in *Boston Ins. Co. vs. Mars* (RE 18, R 812) is misplaced, and constitutes error. *Mars* did not address a situation where the insured provided sworn interrogatory responses that prior statements given were under oath. Rather, *Mars* addressed a scenario where an insured refused to give any testimony under oath on the grounds that several other "statements" had been taken by various entities investigating the loss. 148 So.2d 718, 719 (Miss. 1963). This Court concluded the insurance company was entitled to demand a statement under oath due to the suspicious nature of the fire, (at 720); and that the insured's knowing refusal to provide even one such statement under oath violated the terms of the policy. *Id.* The Trial Court based its ruling in this case on its erroneous finding the Plaintiff took "the position that ***any*** statement under oath was unreasonable," (RE 18, R 812)

(emphasis added), which finding is contrary to the Facts in the Record, *supra.*

Construing the facts in the Record in a light most favorable to the Plaintiff, there are numerous conclusions a Jury could reasonably reach which should have precluded summary judgment in this matter. A Jury in this cause could conclude the Plaintiff and her husband each gave two statements under oath; that Farm Bureau failed to present those statements for Plaintiff's signature; and that Farm Bureau negligently, grossly negligently and/or intentionally excluded documentation of Plaintiff being placed under oath from the purported "transcripts" of those statements produced by Farm Bureau. A Jury could also conclude it was not "reasonable" for Farm Bureau to require Plaintiff to submit to a *third* statement under oath under these circumstances.

As to the issue of supplying financial information, if deemed proper for consideration in light of Farm Bureau's failure to assert same as a basis for its claim denial, a Jury could conclude from the Record that Plaintiff satisfied her obligation to supply financial information by voluntarily signing the *Release of Financial Information* supplied by Farm Bureau. The facts are undisputed that the *Release* required any and all "financial institutions of whatsoever kind or nature to release to [Farm Bureau or its attorneys] **copies** of any and all financial information in the possession of said institutions or their employees with respect to Brenda Mullen" (RE 39, R 497; and the purported transcripts of statements produced by Farm Bureau reveal Plaintiff and her husband voluntarily provided all of the financial information actually requested by Farm Bureau during each of their combined four (4) statements. The plain language of the policy does not expressly require Plaintiff to personally locate, gather, copy and produce financial information to Farm Bureau. A Jury could certainly conclude it was not "reasonable" for Farm Bureau to require Plaintiff to personally expend the considerable time and money necessary to

personally research, find and gather all of the voluminous records identified in Farm Bureau's May 29, 2008 correspondence (RE 128-130, R 599-601), where Plaintiff voluntarily executed a *Release*, requested by Farm Bureau, that allowed Farm Bureau full access to copies of all such records; and where Plaintiff and her husband undisputedly voluntarily appeared on two separate occasions and answered all of the financial information related questions asked by Farm Bureau. This Court has long held it is an insurance company's duty, not an insured's, to conduct an investigation into a claim. Additionally, a Jury could reasonably conclude that, where the facts are undisputed Farm Bureau did not direct Plaintiff to produce documents at any specific time and place, Plaintiff could not have breached a duty to produce same to Farm Bureau.

This case is clearly distinguishable from *Allison vs. State Farm Fire & Cas. Co.*, 543 So.2d 661 (Miss. 1989), cited in the Trial Court's *Findings*, wherein the Court's opinion clearly revealed "the Allisons never complied with [the insurer's] requests . . . that the Allisons sign certain authorizations so that [the insurer] might have access to the Allison's financial records." 543 So.2d at 662. Here, the facts are undisputed the Plaintiff voluntarily executed the *Release of Information* requested by Farm Bureau immediately upon Farm Bureau's request, just 3 days after the fire. RE 39, R 497

Alternatively, a Jury could conclude from the Record that Farm Bureau did not make any additional, "conditional" requests on the Plaintiff, because the facts are undisputed that Farm Bureau did not set forth a specific date, place and time that Plaintiff was requested to appear for another statement under oath and/or produce financial records in any of Farm Bureau's communications and/or purported communications to Plaintiff or her attorney. A Jury could also conclude, as set forth in Hopkins' affidavit, that Plaintiff "could not have 'refused to cooperate", [because] no requests for cooperation or additional information were ever made by Farm Bureau

after [Hopkins] sent his letter of representation and requesting information dated June 24, 2008; rather, Farm Bureau simply denied the claim." RE 126-127, R 597-598

The Trial Judge committed reversible error by not construing the facts in the Record in the light most favorable to the Plaintiff, and by not DENYING Farm Bureau's Motion for Summary Judgment in light of the Jury Questions created through those multiple, disputed issues of material fact.

2. Farm Bureau's Requests for Additional Information Were Not "Reasonable"

Contrary to the conclusion of the Trial Court (RE 15, R 809), the law in Mississippi *does* require evidence a fire is incendiary in nature and/or other suspicious circumstances as a prerequisite to a valid request for an examination under oath or provision of financial information. First, the policy unambiguously states the insured must only submit to an examination under oath and/or provide records as often as Farm Bureau "reasonably requires." RE 29, R 198 Considering the effect of similar policy language, this Honorable Court observed:

> It is a long standing principle that insurers must be given an opportunity to ascertain the finances of the insured in order to determine a possible motive **in an *arson* fire**. In the present case, the concerns of the insurers that arson has caused the fire *were legitimate*, and therefore an investigation was *warranted*.

Monticello Ins. Co. vs. Mooney, 733 So.2d 802, ¶ 15 (Miss. 1999) (emphasis added). This Court went on to discuss voluminous evidence in the Record suggesting that the subject fire was incendiary in nature and intentionally set (including expert testimony and supporting laboratory results), and concluded:

> In light of this evidence, it is clear that the insurers had a *legitimate* reason to question the Mooney's finances to determine a possible monetary motive in setting the fire.

Id. at ¶ 16. (emphasis added) This Court cited *Allison vs. State Farm Fire & Cas. Co.*, 543 So.2d 661 (Miss. 1989) for the proposition that insureds seeking benefits under an insurance policy

"should be aware that they are required to respond to all *reasonable* inquiries and that failure to do so may well deny them recovery," and concluded based on the evidence discussed above that "the inquiries in the present case were reasonable." *Id.* at 21 (emphasis added). Ultimately, this Court concluded "*Due to evidence indicative of arson* in this case, the insurance companies were *justified* in seeking the financial records of Joyce Mooney . . . ." *Id.* at ¶ 29 (emphasis added).

The clear message in *Mooney* is that a policy of insurance that provides an insurer with the right to request financial information and/or statements under oath as often as the insurer *reasonably* requires does not necessarily give the insurer the right to request a statement under oath and/or copies of personal and financial documents in *every* fire loss. Rather, an insurer must have some reasonable evidence that the fire was suspicious, intentionally set and/or incendiary in nature as a prerequisite to such a request, in order to make the request for information "legitimate" and "justified". To hold otherwise would render the policy requirement that the request for information be "reasonable" meaningless.

The cases cited by the Trial Court do not support the Trial Court's contrary conclusion. Although this Court may not have expressly ruled "an insurance company must have evidence a fire is suspicious and/or incendiary in nature in order to justify requiring the insured to appear for an examination under oath and/or provide personal, financial information"; a litany of Mississippi cases addressing the issue expressly hold an insurer's request for such information was appropriate by citing specific circumstances suggesting a suspicious fire. (see, eg. *Mars* at 720, *supra* (holding "the mere fact that the appellant had learned that the sheriff and State Fire Marshal **were investigating an arson charge** in connection with the fire, **was sufficient information to entitle** the appellant to demand the examination under oath as provided for by the policy); *Southern Guaranty Ins. Co. vs. Dean*, 172 So.2d 553, 555-556 (Miss. 1965) (finding

insurer's knowledge there was a substantial explosion before fire, that mortgaged equipment was removed from premises, and that there was excessive insurance on the property, among other suspicious circumstances, "presented a typical situation to which the policy clauses on concealment and oral examination of insured, and full disclosure of all records were intended to apply"); *Allison vs. State Farm Cas. Co.*, 543 So.2d 661, (Miss. 1989) (finding "the fire which caused the loss was incendiary in nature and appeared to have been intentionally set", at 661; citing *Mars and Dean* and finding "This Court . . . found that failure to submit to such an examination, **under circumstances such as those present in the case at bar**, would preclude coverage", at 663)).

In the case at bar, there is no admissible evidence in the Record that the cause of the subject fire was incendiary, or that it was intentionally set. The facts are undisputed that the only evidence about the cause of the subject fire in the Claim File produced to Plaintiff by Farm Bureau is the conclusion of the Fire Chief that the suspected cause of the loss was "heat and air unit shorted out"; and multiple adjuster entries in the Claim File that Plaintiff suffered a "Total Loss due to fire" and that the fire was "due to heating/air unit shorting out". RE 24-27, 50-51; R 496m 963-965, 970, 516 Plaintiff, as the respondent, met her burden of coming forward with evidence, in the form of Plaintiff's sworn answers to Interrogatories and Plaintiff's notarized, *Sworn Statement Proof of Loss*, that the subject fire was not set by Plaintiff and/or someone acting on her behalf. In light of these facts, a Jury in this cause could reasonably conclude there was no legitimate, justified, and/or reasonable basis for Farm Bureau to ask Plaintiff to submit to a statement under oath, and to gather and produce voluminous personal and financial records, *at least* 56 days after Plaintiff submitted her *Sworn Proof of Loss*. If the request were not

"reasonable", Plaintiff's alleged failure to comply cannot be deemed a violation of her contractual obligations under the plain language of the policy.

3. Whether Plaintiff Complied with "Reasonable" Requests for Information Is A Question of Fact That Must Be Determined By A Jury

Although this Court does not yet appear to have addressed the specific issue, whether an insured complied with requests to provide a statement under oath and/or financial information, presents a Jury question, this Court has held

> When an insurance company seeks to avoid the coverage of an insurance policy on the ground of breach of the cooperation clause, it is an affirmative defense. The insurance company carries the burden of proof and must establish the fact of failure of cooperation by a preponderance of the evidence. And the determination of the question of lack of cooperation is one of fact to be determined by the jury.

Employer's Mutual Cas. Co. vs. Ainsworth, 164 So.2d 412 (1964). Although *Ainsworth* addressed claims under an automobile insurance policy, its holding is equally applicable to the issues raised by Farm Bureau's Motion for Summary Judgment. The facts are undisputed that Farm Bureau presented its allegations Plaintiff failed her duty of cooperation as affirmative defenses to Plaintiff's Complaint. R 25-26

Indeed, in an analogous case considered by the United States District Court for the Southern District of Mississippi, the Court was faced with a scenario where the Record supported a conclusion the insured had provided some information in a prior statement under oath, and where for a number of reasons a subsequent statement under oath requested by the insurer was never completed. *Cain vs. United States Fire Ins. Co.*, 2008 WL 2094235, *2 (S.D. Miss. 2008). The Court noted the Record did not support a finding of "willful refusal" to comply, but that there was some confusion between the parties about what was required. The Court concluded that "other disputed questions of fact, such as the reasonableness of U.S. Fire's request for further examination . . . should be considered by the finder of fact before a

determination is made regarding [the insured's] alleged failure to comply with the terms of the insurance contract." *Id.* at 3.

As demonstrated, *supra*, the evidence in the case at bar likewise does NOT demonstrate a "willful refusal" to comply with further requests for information by Farm Bureau. Hopkins repeatedly confirmed the Plaintiff *was* willing to cooperate, and made reasonable requests that Farm Bureau provide certain information, including the transcripts of prior statements under oath. RE 124-127, 131-132, 135-136; R 595-598, 603-603, 606-607. Farm Bureau neither provided the information Hopkins requested, nor advised him Plaintiff was not entitled to the information he requested under the policy. RE 124-127; R 595-598 Construing the evidence in the light most favorable to Plaintiff, Farm Bureau never requested Plaintiff appear for another statement under oath and/or provide specific information at ANY specific time or place; made NO REPLY to Hopkins' letter of representation and offer to cooperate, but simply denied the Plaintiff's claim; and made no effort to reconsider the matter even after Hopkins confirmed neither he nor Plaintiff received ANY communication from Farm Bureau following Hopkins letter of representation, and/or renewed offer to cooperate. RE 124-140, R 595-611

Plaintiff notes that summary judgment should also have been denied because Farm Bureau failed to demonstrate it suffered any prejudice as a result of Plaintiff's alleged failure to cooperate. Citing *U.S.F.&G vs. Wiggington*, 964 F.2d 487 (5th Cir. 1992), which in turn relied upon numerous Federal Court cases and decisions of this Court that do not appear to expressly address this issue in circumstances such as those in the case at bar, The Trial Court erroneously held no showing of prejudice is required under Mississippi law in such instances (RE 19, R 813).

In *State Farm Mut. Auto. Ins. Co. vs. Commercial Union Ins. Co.*, this Court considered the effect of failure to comply with an insurance company's investigation under an automobile

liability policy. This Court concluded

> Although there is authority to the contrary, we believe the better view is to hold that unless some prejudice is shown by an insured's failure to cooperate with the insurance carrier in its investigation, such failure does not operate to forfeit the insured's rights under the policy.

394 So.2d 890, 893 (Miss. 1981) (case citations omitted) (citing 14 G. Couch, *Cyclopedia of Insurance Law* § 51:112 (2d ed. 1965) ("states failure to cooperate cannot constitute a breach unless shown to be prejudicial"). Plaintiff respectfully submits *Commercial Union* is the proper, and applicable pronouncement of the law in this State on this issue.

E. Farm Bureau Failed To Comply With The Policy's 60 Day Payment Requirement

The Trial Court also erroneously rejected Plaintiff's argument that a Jury must be allowed to consider whether Farm Bureau's request that the Plaintiff submit to an examination under oath and produce copies of voluminous personal and financial records were reasonable in light of the Loss Payment provision in the policy. RE 19-21, R 813-815. The policy requires, in pertinent part:

> **10. Loss Payment** We will adjust all losses with you. We will pay you unless some other person is named in the policy or is legally entitled to receive payment. Loss will be payable 60 days after we receive your proof of loss and: (a) reach an agreement with you; (b) There is an entry of final judgment; **or** (c) There is a filing of an appraisal award with us.

RE 49, R 199

The facts are undisputed Plaintiff signed the requested *Sworn Statement Proof of Loss* on April 3, 2008, and it was initialed by Farm Bureau adjuster Corey Wilburn on April 3, 2008. RE 37-38, R 498-499. The facts are undisputed Farm Bureau determined how much coverage was potentially available to cover the loss on April 1, 2008 (RE 26-27, R 964-965); and determined the fire damage resulted in a "total loss" on April 4, 2008. RE 50-51, R 970, 516 Plaintiff's

sworn interrogatory responses also establish she was told by Farm Bureau Adjuster "Delila" that the fire caused a total loss of the dwelling and contents. *Supra* The facts are also undisputed Plaintiff provided Farm Bureau with a list of contents, and authorized Farm Bureau to "handle as you want on contents". RE 52-53, R 517-518. Construing these facts in the light most favorable to Plaintiff, a Jury in this cause could conclude Plaintiff and Farm Bureau were in "agreement" the dwelling was a "total loss" and that Farm Bureau could handle the contents claim unilaterally. As such, the policy required Farm Bureau to pay Plaintiff's claim no later than Monday, June 2, 2008 (60 days from submission of *Sworn Statement Proof of Loss*).

In *Gates vs. State Farm General Ins. Co.*, 740 F.Supp. 1237 (S.D. Miss. 1990), the United States District Court for the Southern District of Mississippi considered a Loss Payment provision identical to that contained in the subject policy. Judge Barbour held 60 day provisions such as that contained within the subject policy must be strictly enforced against the drafting insurance company, and that failure to do so would render the policy provision meaningless. *Id.* at 1240. Ultimately, Judge Barbour held the Loss Payment provision of the policy did not prevent the insurer from conducting further investigation into the circumstances of the loss in light of the specific facts before that Court – by noting that the insurance company sought to schedule an examination under oath of its insured "more than 20 days before the expiration of the 60-day period," **and on a date certain** that "would have taken place more than 10 days before the expiration of the period." *Gates*, at 1241. The requested examination under oath in that case was postponed, not due to lack of diligence on the part of the insurer, but due to scheduling conflicts of the insured's attorney. The Court held that these circumstances, *paired with substantial evidence that the nature of the fire was suspicious*, created a reasonable basis for the insurer to conduct further examination under oath, and that "Defendant cannot be penalized

for failure to make or deny payment within the 60-day period, since the delay of the examination beyond the expiration of the period was attributable solely to the actions of the Plaintiffs and their attorney." *Id.*

In the case at bar, the facts are undisputed Farm Bureau's request that Plaintiff provide another statement under oath, and gather and produce voluminous records, was made for the first time in a letter from Farm Bureau's representative that bears the date May 29, 2008 – 56 days after Plaintiff submitted her *Sworn Statement Proof of Loss*. There is no evidence the letter was actually mailed on May 29, 2008, *supra*, however Hopkins' affidavit confirms Plaintiff delivered a copy of the letter to him on June 23, 2008. RE 124, R 595 Even if one were to construe the facts in the light most favorable to *Farm Bureau,* and conclude the letter was *mailed* on Thursday, May 29, 2008, four (4) days prior to the expiration of the 60 day loss payment period, and giving it three days for mailing, it would not have been delivered to Plaintiff prior to Monday, June 2, 2008. Given the incredible volume of documents the May 29, 2009 letter asked Plaintiff to locate, gather and produce RE 128-130, and the undisputed fact Farm Bureau never gave Plaintiff a specific date, time or place on which she was supposed to comply with Farm Bureau's requests, this Court can take Judicial notice it would have been *impossible* for Farm Bureau to complete its investigation within the 60 day time period mandated by the policy.

This "impossibility" was not due to circumstances outside of Farm Bureau's control, as in *Gates*, but was solely attributable to Farm Bureau's dilatory claims tactics. Farm Bureau failed to present the Court with any evidence justifying its failure to complete its investigation within the 60 day window from Plaintiff signing Farm Bureau's *Sworn Statement Proof of Loss*, or with any explanation about why it waited until *at least* May 29, 2008 to send the subject requests to the Plaintiff. Construing the facts in the light most favorable the Plaintiff, the Trial Court was

bound to conclude a Jury could determine Farm Bureau's twelfth hour request for information was not "reasonable" in light of the 60 day payment provision of the policy, and to DENY Farm Bureau's Motion for Summary Judgment.

IV. CONCLUSION

The Record in this case proves Plaintiff, and her Husband, voluntarily and promptly made every reasonable effort to cooperate with Farm Bureau's investigation. Plaintiff and her husband provided all of the information Farm Bureau actually requested from them following the fire, and throughout the entire 60 day period following Plaintiff's submission of the *Sworn Statement Proof of Loss* requested by Farm Bureau. Farm Bureau, on the other hand, engaged in dilatory claims tactics, and simply buried its head in the sand and denied the claim when Plaintiff hired a lawyer.

By adopting, substantially verbatim, the voluminous *Findings* and *Judgment* proposed by Farm Bureau, the Trial Court made findings of fact that were contrary to the Record, and/or skewed disputed facts in favor of Farm Bureau, the Summary Judgment Movant. In so doing, the Trial Court committed clear error. Plaintiff respectfully requests this Court Reverse all of the Findings, Conclusions, Rulings and Judgments of the Trial Court, and Remand this cause to the Circuit Court of Tippah County, Mississippi, so this case may be tried on its merits, and so a properly empanelled Jury can resolve the numerous, disputed issues of material fact demonstrated by the Record.

Plaintiff incurred substantial costs pursuing this appeal. Plaintiff prays that all costs of this appeal be accessed against Farm Bureau in accordance with Miss. R. App. P. 36. Plaintiff further prays that, in Reversing and Remanding this Cause to the Circuit Court of Tippah County, this Court instruct the Trial Court to tax Farm Bureau with all costs incurred by the Plaintiff in opposing Farm

Bureau's Motion for Summary Judgment, as the Trial Court erroneously taxed all costs of the underlying cause against the Plaintiff in its Judgment. RE 23, R 817

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, undersigned counsel, do hereby certify that I have this day served, via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of the Appellant to the following:

TRIAL JUDGE:

The Honorable Andrew K. Howorth,
Circuit Court Judge
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Respectfully submitted, this, the 10th day of December, 2010.

BRENDA L. MULLEN, Appellant

By: _____
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