IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BERTIN C. CHEVIS	PLAINTIFF/APPELLANT
VERSUS	NO. 2010-CA-00861
MISSISSIPPI FARM BUREAU MUTUAL INSURANCE COMPANY	DEFENDANTS/APPELLEES

APPEAL FROM THE CIRCUIT COURT
OF HANCOCK COUNTY, MISSISSIPPI
HANCOCK COUNTY CIRCUIT COURT NO. 08-0514

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REPLY BRIEF

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ORAL ARGUMENT NOT REQUESTED

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SUPPLEMENTAL STATEMENT OF FACTS

In its Brief, Farm Bureau makes admissions that were not previously made, which are relevant to the issues in this appeal, and further support Dr. Chevis' claims. First, Farm Bureau states that it "does not dispute that Farm Bureau agents obtained for Chevis Farm Bureau Business Package Policy BP907600, submitted the MWUA application for Chevis, and accepted the initial premium payments for each policy." (Brief pg. 20) Counsel goes on to argue that since one of the policies sold by them contained an undefined exclusion , for "windstorm", not "wind damage" as stated by Farm Bureau, they would not be liable for payment under all of the policies they sold. Farm Bureau sold Dr. Chevis, according to their admission, the policy which they say covers the very loss excluded from the other policy they sold him. Dr. Chevis bought a Business Policy of Insurance from Farm Bureau to cover all loss but flood. They purported to do this and now admit to it. When he made a claim for his loss, he was directed to different offices and adjusters and after a prolonged and painful process was only partially paid for the total loss of his building. Another tacit admission is made in Farm Bureau's argument that the summary judgment hearing exhibits, provided to the Trial Court but not included in the transcript, the most important being the Farm Bureau letter noting "named storm" coverage. Their assertion is that Dr. Chevis should have made sure the transcript was complete before designating it. However the record had to be, and was, designated on June 8, 2010, but the transcript was not prepared until, including additional time granted by the Court, September 17, 2010. According to the transcript, the Court had the letter (Record Excerpts, Tr. Pg. 11) and had a discussion about the letter with counsel for Farm Bureau, so there was no reason to believe it would not be in the Court file and provided with the hearing transcript. This is nothing like Farm Bureau's attempt to

enhance the record with hundreds of pages of documents never provided to the Court. Although he had bought insurance including named storm coverage that should have covered all of his losses, his insurers have left him with over Two Hundred Thousand Dollars ($200,00.00) in uncompensated losses. Farm Bureau, the insurer where he had purchased all of his coverage, specifically including named storm wind & hail, denied coverage after Katrina, claiming that an undefined exclusion barred his claim against them and that they were not responsible to their insured for anything beyond coverage for contents. Dr. Chevis contracted with Farm Bureau for the package of insurance, as noted in the coverage description on Farm Bureau letterhead; he paid the premiums exactly as demanded, and when he suffered a loss, Farm Bureau refused to pay. Whether part of the breach is the failure of Farm Bureau to provide all of the coverage for which Dr. Chevis paid them is of no import. The letter which Farm Bureau tries so hard to exclude describes what Dr. Chevis bought from them, including wind and hail; their failure to pay for covered losses is breach.

STANDARD OF REVIEW

On appeal, the Court reviews summary judgment de novo. The Mississippi Supreme Court said in Architex Ass'n, Inc., v. Scottsdale Ins. Co., 27 So.3d 1148, 1156 (Miss. 2010), "This Court has stated that...[t]he circuit court's grant [or denial] of a motion for summary judgment is reviewed by this Court de novo. See *Wilner v. White*, 929 So.2d 315, 318 (Miss.2006)...In this Court's de novo review, '[t]he evidence must be viewed in the light most favorable to the party against whom the motion has been made.' *Daniels v. GNB, Inc.*, 629 So.2d 595, 599 (Miss.1993)" Here, the Trial Court not only decided the narrow issue of definition of a policy exclusion term, but decided jury fact issues against Plaintiff, including agency and causation, and entered final judgment in favor of the Defendant.

SUPPLEMENTAL ISSUES

1. FARM BUREAU SOLD / PROVIDED BOTH THE COVERAGE WITH A WIND & HAIL EXCLUSION AND THE WIND & HAIL COVERAGE TO COVER OR AMELIORATE SAID EXCLUSION, AND SHOULD NOT PROFIT BY VAGUE AND HARSH EXCLUSIONARY LANGUAGE.

The Honorable Trial Court Judge found, in granting Summary Judgment, that "the Farm Bureau policy at issue does not define 'windstorm'". The coverage including the exclusionary language and the coverage to cover the excluded peril were both sold to Dr. Chevis by Farm Bureau. Now he is faced with one company asserting an exclusion for "windstorm" and another company denying coverage because it was not a windstorm. The Supreme Court stated in Corban v. United Services Automobile Ass'n, 20 So.3d 601 (Miss. 2009) "The substantive contract law of this state likewise has been clearly declared by this Court to include the following concepts...if a contract is clear and unambiguous, then it must be interpreted as written...If a contract contains ambiguous or unclear language, then ambiguities must be resolved in favor of the non-drafting party...exclusions and limitations on coverage are also construed in favor of the insured. Language in exclusionary clauses must be "clear and unmistakable," as those clauses are strictly interpreted. *United States Fid. & Guar. Co. V. Martin*, 998 So.2d 956, 963 (Miss.2008)(internal citations omitted). See also *Frazier v. N. Miss. Shopping Ctr. Inc.*, 458 So.2d 1051, 1054 (Miss.1984)("[a] construction leading to an absurd, harsh or unreasonable result in a contract should be avoided unless the terms are express and free of doubt.")" Defendant Farm Bureau's reliance on Penthouse Owners Ass'n. Inc, v. Certain Underwriters at Lloyds, London, No. 91866 (S.D. Miss. July 2, 2008) is misplaced, as on review the Fifth Circuit held "[i]n Mississippi, when the terms of an insurance

policy are unambiguous, they must be enforced as written. *Miss. Farm Bureau Cas. Ins. Co. V. Britt*, 826 So.2d 1261, 1266 (Miss. 2002). However, if the policy is subject to two reasonable interpretations, the interpretation giving greater indemnity to the insured will prevail. *J&W Foods Corp. V. State Farm Mut. Auto Ins. Co.*, 723 So.2d 550, 552 (Miss. 1998). Exclusions and limitations are reviewed stringently; they must be clear and unambiguous. Id.; see also *Corban v. United Svcs. Automobile Ass'n*, 20 So.3d 601, 609 (Miss. 2009) ("Language in exclusionary clauses must be clear and unmistakable."). An insurer "bears the burden of showing that an exclusion applies and that it is not subject to some other reasonable interpretation that would afford coverage." *Delta Pine & Land Co. V. Nationwide Agribusiness Ins. Co.*, 530 F.3d 395, 402 (5th cir. 2008). Penthouse Owners Ass'n. Inc, v. Certain Underwriters at Lloyds, London, 612 F.3d 383, 386 (5th Cir. 2010).

The law regarding exclusionary language in Mississippi, and apparently in the Fifth Circuit, is that set out in Corban, supra, and not that in Penthouse, supra, or Kemp v. American Universal Ins. Co., 391 F.2d 533 (5th Cir. 1968) as cited by Farm Bureau. The Court must make every reasonable effort to construe undefined exclusionary terms to afford coverage.

Especially where the party seeking the benefit of the exclusion drafted it and sold both the coverage containing the exclusion and the coverage purporting to cover the excluded event, undefined terms must be construed against the insurer. The law requires that the undefined exclusionary terms in Defendant Farm Bureau's policies be construed in Plaintiff's favor. Farm Bureau should not be able to sell coverage with an exclusion and coverage for the excluded coverage which leaves the insured uncompensated. We respectfully urge that the Trial Court Judge erred when he construed such harsh and undefined exclusionary

language against the insured.

2. THE POLICY IN QUESTION COVERED "NAMED STORMS" AND APPLIED TO HURRICANE KATRINA.

Plaintiff has repeatedly noted that all coverages were purchased through Farm Bureau Insurance, and has stated that the coverage he purchased through Farm Bureau was "named storm" coverage. It is important to note that Farm Bureau, the company who sold and collected a premium for "named storm" coverage which would have covered all losses from Hurricane Katrina, is also the company claiming a wind & hail exclusion and throwing up their hands when their principal or co-principal wants to limit coverage. Plaintiff/Appellant has already provided the paperwork that was offered at the hearing which shows Plaintiff purchased "named storm" coverage through Farm Bureau. At the very least, Farm Bureau breached their agreement to place "named storm" coverage when they offered and charged a premium for it. Whether Farm Bureau provided what was purchased through its office is certainly a Jury issue. Because Dr. Chevis was offered and purchased "named storm" coverage through Farm Bureau we respectfully urge they were bound to provide it without exclusion. In Fonte v. Audubon Ins. Co., 8 So.3d 161 (Miss. 2009), the Supreme Court states:

> 'A summary judgment motion is only properly granted when no genuine issue of material fact exists.' *Jackson Clinic for Women, P.A. v. Henley*, 965 So.2d 643, 649 (Miss.2007)(citing *PPG Architectural Finishes, Inc., v. Lowery*, 909 So.2d 47, 49 (Miss.2005); *Miller v. Meeks*, 762 So.2d 302, 304 (Miss.2000)). '[T]he evidence must be viewed in the light most favorable to the party against whom the motion has been made.' *One South*, 963 So.2d at 1160; *Green v. Allendale Planting Co.*, 954 So.2d 1032, 1037 (Miss. 2007) (quoting *Price v Purdue Pharma Co.*, 920 So.2d 479, 483 (Miss. 2006)). "The moving party has the burden of demonstrating that no genuine issue of material fact(s) exists, and the non-moving party must be given the benefit of the doubt concerning the existence of a material fact." Id. (quoting *Howard v. City of Biloxi*, 943 So.2d 751, 754 (Miss.Ct.App. 2006)).

This particular issue was raised but never addressed by the Trial Court Judge. This is a fact issue for the jury. The Judge even specifically raised the coverage letter attached to Farm Bureau's business package. We respectfully urge that it was error for the Honorable Trial Court Judge to decide jury fact issues such as agency and contract terms when even the Appellee agrees that they are in dispute.

3. MISSISSIPPI FARM BUREAU SOLD AND BROKERED THEIR "BUSINESS PACKAGE OF INSURANCE" AND IS LIABLE FOR ALL COVERAGES THEREIN.

It is clear even from the limited record necessary to consider this appeal that all of the coverage Dr. Chevis bought to cover his office were bought through the Farm Bureau office in Hancock County. Farm Bureau has finally admitted this in their brief. This issue was raised in the original Complaint and consistently asserted throughout the proceedings. The issue of agency or co-principals was never addressed by the Trial Court Judge; as soon as he went outside the policy to define undefined exclusionary terms he decided all the pending fact issues and dismissed the primary insurer. The record shows that all of the coverages were bought through Farm Bureau, yet they were dismissed without any consideration of this fact issue. We respectfully urge that this dismissal of the company selling all coverages is not proper under Rule 56 or any of the Mississippi law on point. See Fonte, supra, and Miller v. R.B. Wall Oil Co., Inc, 970 So.2d 127 (Miss. 2007) stating that the existence of agency is a fact issue for the jury. It was error for the Honorable Trial Court Judge to dismiss Farm Bureau on his finding alone that an undefined exclusion applied without considering whether Farm Bureau was the insurer, agent or co-principal, and whether they breached by failing to obtain the coverage they sold to Dr. Chevis.

CONCLUSION

For all of the above and foregoing reasons, Plaintiff/Appellant Bertin C. Chevis moves this Honorable Court reverse the Judgment of the Trial Court with instructions to construe the policy exclusions against Farm Bureau, consistent with Mississippi Law, deny Summary Judgment, allow this matter to proceed to trial, and for such other and further relief as deemed just in the premises.

Respectfully submitted May 16, 2011,

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Certificate of Service

I, John F. Ketcherside, hereby certify that on this the 16th day of May, 2011, I have mailed the original and four copies of the above and foregoing Brief of Appellant to the Clerk of the Supreme Court, one copy to John A. Banahan, Esq., Counsel for Defendant, and one copy to John C. Gargiulo, Trial Court Judge.

John F. Ketcherside

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CERTIFICATE OF SERVICE OF REPLY BRIEF OF APPELLANTS

I hereby certify that on the 16th day of May, 2011, I mailed a copy of the Reply Brief of Appellants to: John A. Banahan, Esq., Bryan, Nelson, Schroeder, Castigliola & Banahan, PLLC, PO Drawer 1529, Pascagoula, MS 39568, attorney for Mississippi Farm Bureau Mutual Insurance Company and The Honorable John C. Garguilo, Circuit Court, P.O. Box 1461, Gulfport, MS 39502, Trial Court Judge.

Respectfully submitted,

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A copy of the above and foregoing was mailed, U. S. Mail, postage prepaid, to:

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and a copy to:

The Honorable John C. Garguilo
Circuit Court Judge
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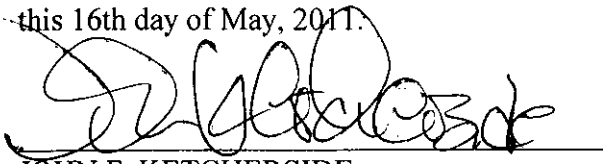
Gulfport, MS 39502
Trial Court Judge

this 16th day of May, 2011.



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