MISSISSIPPI COURT OF APPEALS

NO. 2011-CA-01164

JIMMY EARL DANIELS — PLAINTIFF/APPELLANT

V.

PARKER AND ASSOCIATES, INC., A MISSISSIPPI CORPORATION; THE LIBERTY GROUP, INC., A MISSISSIPPI CORPORATION; AND DALVIN KENDALL PARKER — DEFENDANTS/APPELLEES

ON APPEAL FROM THE CIRCUIT COURT OF LAUDERDALE COUNTY, MISSISSIPPI

BRIEF OF DEFENDANTS/APPELLEES

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ORAL ARGUMENT NOT REQUESTED

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.

Plaintiff/Appellant and His Counsel:

1. Jimmy Earl Daniels, Plaintiff/Appellant
2. Jim Waide, Attorney for Plaintiff/Appellant
3. Rachel M. Pierce, Attorney for Plaintiff/Appellant
4. Waide & Associates, P.A., Attorneys for Plaintiff/Appellant

Defendants/Appellees and their Counsel:

5. Parker & Associates, Inc., Defendant/Appellee
6. The Liberty Group, Inc., Defendant/Appellee
7. Dalvin Kendall Parker, Defendant/Appellee
8. Greg Snowden, Attorney for Defendants/Appellees
9. Phillip Gunn, Attorney for Defendants/Appellees
10. Richard G. Norris, II, Attorney for Defendants/Appellees
11. Wells Marble & Hurst, PLLC, Attorneys for Defendants/Appellees

This the 2nd day of February, 2012.

Richard G. Norris, II (MSB No. [redacted]

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STATEMENT OF THE CASE

I. FACTS

Parker and Associates, Inc. ("Parker") is a field marketing organization ("FMO") which sells insurance products issued by various insurers through independent agents, like Plaintiff. The Liberty Group, Inc. ("Liberty") is a subsidiary of Parker. Dalvin Kendall Parker ("Ken Parker") is a shareholder of Parker.[1] Plaintiff was an independent insurance agent who affiliated himself with Parker to sell various insurance products, including Medicare Advantage, issued by, among others, Humana, Inc., Coventry and Universal American Corp., whose subsidiaries include Pennsylvania Life Insurance Company ("Penn Life"), Pyramid Life Insurance Company ("Pyramid Life") and Union Bankers Insurance Company ("Union Bankers").

Plaintiff was NOT an employee of Parker or any of the other Defendants. Plaintiff signed several documents addressing specific issues [R. at 107-110], including a Broker Agreement which specifically provided – as Plaintiff readily admits – that Plaintiff was an independent contractor.[2] [R. at 3; 107] As such, Plaintiff could control what products he sold, who he sold them to, and when and where he sold them. Plaintiff did NOT, however, have an employment agreement, noncompetition agreement, or any other agreement of any kind that locked Plaintiff

[1] Collectively, Parker, Liberty and Ken Parker will be referred to as "Defendants."

[2] As an independent contractor, Plaintiff contracted directly with numerous insurance carriers, including those listed above, listing Parker as his FMO. By way of background, an individual must be contracted with an insurer and appointed through the state to enable him/her to sell that insurer's products. The contract with the insurer dictates, among other things, the volume that must be sold by the agent to maintain the contract, how commissions will be calculated, and when and to whom the commissions will be paid. Often, independent agents contract with insurers and name an FMO in their contract. The FMO provides the independent agent with marketing, training and support services and often meets the volume requirements for the specific carriers by aggregating the volume generated by multiple agents (thereby making the contract with the insurer possible in the first place). In return, the FMO usually gets an override commission beyond that paid to the independent agent. Sometimes, the agents themselves become "managing agents" and affiliate other agents under them. The managing agent in that scenario sometimes receives an override commission on the products sold by the agent under him/her. This system is sometimes referred to as an up-line commission hierarchy.

into an exclusive agency agreement[3] with Parker or limited Plaintiff from terminating his agreement with Parker and selling for another FMO. [R. at 107-110]

In return for selling policies through Parker, Parker paid Plaintiff an advanced, or *__unearned__*, commission[4] on each Medicare Advantage application Plaintiff input in Parker's Agent-Trax system (indicating he had submitted an application for the same to the carrier), usually within a week of Plaintiff inputting the information. [R. at 82-83; 114-115][5] Once a policy was actually issued by the insurer and deemed good business, the insurer paid Parker the *__earned__* commission on the policy. [R. at 83; 115] If, however, the application was never received by the carrier, was rejected by the insurer or the policy was rescinded, the carrier would pay no commission to Parker. If no commission was received by Parker in the regular course on an application, Parker would contact the insurer and inquire about the unpaid commission to determine if a commission was forthcoming. Ultimately, if no commission was paid by the carrier, Parker "charged back" the advanced commission it previously paid to Plaintiff.[6] [R. at 83; 115-118] In other words, Parker advanced *__unearned__* commissions to Plaintiff with the understanding that if an *__earned__* commission was not thereafter paid by the insurer, then Plaintiff would repay the money advanced. *Id.* Plaintiff fully understood the system to work in this

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[3] Plaintiff claims, incorrectly, that the Agreement to Work Leads [R. at 109] and Broker or Brokerage Agreement [R. at 107] he signed created an "exclusive agency agreement." As explained hereafter in *Argument* Section I, *infra*, Plaintiff's argument is not supported by a plain reading of either of these documents.

[4] Plaintiff was paid "unearned" commissions, as opposed to an "earned" commission. The terms "earned" and "unearned" commissions are terms of art often used in the insurance industry. An "unearned" commission is, in essence, a commission that is paid in advance, before it is earned and owed.

[5] The amount of Plaintiff's advanced commission varied both over time and from insurer to insurer. [R. at 185-192] Plaintiff admits he was not simply paid $325 per application as previously alleged in the Complaint. [*Compare Id.* and R. at 3; 5]

[6] The Centers for Medicare and Medicaid Services govern the activation of Medical Advantage policies and set the parameters (as do the insurers themselves) as to when a commission is due. There are some additional situations, beyond those set out above, under the CMS rules that render a commission un-payable. Defendants do not control the rules governing when a commission is due or paid.

manner and that he would have to pay back any commissions not reimbursed to Parker by the insurers. [R. at 115-118] "Charge backs" for advanced, unearned commissions and expenses[7] are standard and customary practice in the insurance industry, especially with respect to FMOs.

Parker, because of the nature of the industry and necessary "charge backs" that Plaintiff owed and was incurring, established an "escrow account" for Plaintiff with Plaintiff's full knowledge and consent, whereby a percentage of the advanced, *unearned* commissions paid to Plaintiff would be placed into an account to offset – or help offset – charge backs that were owed by Plaintiff to Parker.[8] [R. at 85-86] Originally, ten percent (10%) of Plaintiff's *unearned* commissions were placed into such an account, but due to the amount of charge backs incurred the amount was increased to twenty-five (25%) and then to thirty-five percent (35%) of Plaintiff's *unearned* commissions. [R. at 3-4; 85-86; 119-120]

Plaintiff ceased writing business through Parker in December of 2007. [R. at 4] With no new applications being processed, there were no new application commissions generated on Plaintiff's behalf. Thus, in the months that followed Plaintiff's voluntary termination of his relationship with Parker, Plaintiff's charge backs (due to applications that had been written by Plaintiff being rejected by the insurers, withdrawn by the insureds, or otherwise dropping off pursuant to the rules established by the various insurers and the Centers for Medicare and Medicaid Services) created a negative balance on Plaintiff's debit ledger.

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[7] Plaintiff also specifically agreed that certain other expenses would be advanced by Parker, but repaid by Plaintiff to Parker. [R. at 107-110] Such expenses included, among others, Errors and Omissions (E&O) insurance coverage, postage and delivery charges, lead fees, and licensing, appointment and renewal fees. *Id.* Plaintiff signed agreements that specifically indicated that these expenses would be advanced by Parker, but would have to be repaid by Plaintiff. *Id.*

[8] It is important to note that the funds placed into said account were advanced, *unearned* commissions. In other words, these were not *earned* commissions that belonged to and were being withheld from Plaintiff. Put simply, rather than advancing Plaintiff the full *unearned* commission on new applications, a portion of that *unearned* commission was placed into an account to pay charge backs owed by Plaintiff.

On October 1, 2008, ten months after Plaintiff voluntarily terminated his relationship with Parker, Plaintiff requested via e-mail that Parker provide him a "release" so he could "pursue other opportunities."[9] [R. at 136] Namely, Plaintiff wanted to go to work for Penn Life [R. at 138] and the Penn Life representative that Plaintiff interviewed with, Sutter Smith, [R. at 129-130] told Plaintiff that Penn life required a "release." [R. at 157-158] According to Sutter Smith, a release was required to prove "[Plaintiff] had made appropriate arrangements with his prior marketing organization or upline hierarchy *to meet any financial obligations he had with that organization* or agency, such as payment of lead expenses, *compensation advances*, loans, administrative overhead, postal charge, etc." *Id.*[10] Stephen Voss, the Human Resources Director

[9] None of the agreements Plaintiff signed with Parker discussed or required a "release." [R. at 107-110] In fact, Plaintiff conceded at the summary judgment hearing that the "release" requirement was a Penn Life requirement, not some condition set forth in Plaintiff's agreement with Defendants. [R. at 435]

[10] According to Plaintiff, "other employers desiring to hire Jimmy Earl Daniels would be concerned about their liability if they hired him, absent formal acknowledgement that the exclusive agency arrangement with [Defendants] had been cancelled," hence (according to Plaintiff) Penn Life's requirement of the "release." *See* Brief of Appellant, p. 6-7. As set forth in *Argument* Section I, *infra*, however, Plaintiff did NOT have an "exclusive agency relationship" with Defendants and such was NOT the purpose of the release according to the man who actually communicated the release requirement and his boss.

Plaintiff's own actions also belie his argument. Approximately four months after terminating his relationship with Parker, in April of 2008, Plaintiff wrote Humana directly and sought a release from his contract with them. [R. at 131-132] Plaintiff was released from that contract on July 9, 2008. [R. at 133] In August of 2008, Plaintiff wrote Union Bankers directly and sought a termination of his appointment with it. [R. at 134] Plaintiff's was released from that contract on September 25, 2008. *Id.* In October of 2008, Plaintiff wrote Universal American directly and sought termination of his appointment with Pyramid Life (a Universal American subsidiary). [R. at 135] According to Universal American, Plaintiff's appointment with Pyramid Life was terminated on October 1, 2008. *Id.*

When an contract and appointment with a carrier is terminated such has the effect of releasing the independent agent from his upline commission hierarchy with that carrier, as established through his contract, i.e., the contract entitling the FMO to a commission is cancelled and the agent is released from the FMO. The agent may thereafter, if agreed to by the insurer, enter another contract with the insurer and appoint another brokerage or FMO. Plaintiff's actions demonstrate his knowledge that he could go directly to his insurer and cancel his contracts and appointments with them, thereby terminating Parker's rights to an override commission on any sales he made of that insurer's products. Indeed, because the contracts were between Plaintiff and the insurers and simply listed Parker as the FMO, Parker was not a party to the contract and, thus, could not release (or control the release) of the appointments.

Penn Life, like Pyramid Life and Union Bankers, is a subsidiary of Universal American. *Id.* (listing Universal American Subsidiaries across the bottom of the letter). Thus, Plaintiff could have contacted Penn Life directly and requested a termination of his appointment with Parker, like he did with Pyramid and Assistant Vice President of Penn Life's parent, Universal American Corp., confirmed Smith's understanding of the purpose of the release. [R. at 161-162] [11]

Michael Hosch responded on Parker's behalf to Plaintiff's e-mail approximately two hours later setting forth the procedure applicable to all agents to obtain a release. [R. at 137] Of note, Hosch did not deny Plaintiff a release. *Id.* Rather, Hosch explained the process of obtaining a release, and even explained why the process was required. *Id.* Namely: (1) a reciprocal agreement had to be put in place with the company Plaintiff wished to be released to such that "charge backs" could be assigned to that company and Parker would not lose the money it had advanced; (2) a reconciliation had to be done to verify charge backs (*i.e.*, Parker would obtain statements from each insurer to determine commissions paid and owed and compare those statements with the advanced commissions Parker previously paid to Plaintiff to determine the balance owed, if any); and (3) national had to approve the release. *Id.*

Plaintiff provided the name of the company to which he wished to be released the following day (October 2, 2008) – Penn Life – and requested information on the reconciliation four days later (on October 6, 2008). [R. at 138-140] Michael Hosch responded on Parker's behalf to Plaintiff's e-mail requesting the status of the reconciliation, this time within seven minutes of Plaintiff's e-mail. [R. at 140] Mr. Hosch indicated that Plaintiff's reconciliation had

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and Union Bankers, if his concern was truly that other employers would be concerned about any purported "exclusive agency agreement" (that never actually existed) with Defendants.

[11] While, at first glance, it may seem odd that Penn Life would be worried about ensuring Plaintiff had taken care of his financial obligations to a prior FMO, it makes perfect sense when it is considered that such requirements are reciprocal in the industry. If an agent is paid advanced commissions and leaves his FMO, the FMO could be held holding the bag for the agent's chargebacks. To prevent such problems, an FMO or upline commission hierarchy, like Penn Life, will request the agent demonstrate it has taken care of its financial obligations to the prior FMO via a release. In turn, when Penn Life agents switch to another FMO or upline commission hierarchy, that FMO will request a release from Penn Life to ensure the agents' financial obligations to Penn Life have been handled. Otherwise, reciprocal agreements have to be put in place between the two FMOs such that charge backs owed to the original FMO are assigned to the new FMO. Such is reciprocal agreement referenced by Mr. Hosch. [R. at 137]

been ordered and that he should contact Wayne Swift regarding the same. *Id.* Rather than contacting Wayne Swift, however, Plaintiff (at least purportedly)[12] contacted an attorney to obtain the release. Indeed, later that day (October 6, 2008), Rhonda Herring, a paralegal at the law firm of Phelps Dunbar, contacted Greg Snowden at Parker and requested copies of various documents, including a copy of Plaintiff's contract and a detailed accounting of Plaintiff's commissions, charge backs and other items. [R. at 141-142] Mr. Snowden responded within fifteen minutes of Ms. Herring's e-mail confirming that the information would be compiled. *Id.*

Approximately a week later, on October 13, 2008, Parker completed the audit requested by Plaintiff and provided the same, in two e-mails, from Mr. Hosch to Ms. Herring. [R. at 143-144] In response, Ms. Herring thanked Mr. Hosch for his "prompt response" and asked that Parker proceed with whatever was necessary to finally release Plaintiff. [R. at 144] Mr. Hosch responded inquiring as to whether Ms. Herring had received the second e-mail, as it indicated that Plaintiff's Medicare Advantage charge backs were over $24,000. [R. at 145-146] Ms. Herring responded that she had received the information, but that it did not match Plaintiff's records and that they were performing an "item by item audit." [R. at 147-148]

The following day (October 14, 2008), Ms. Herring responded again indicating that Plaintiff had reviewed all the information provided by Parker and found that the same did not match his records. [R. at 149-150] By way of example, Plaintiff disputed charge backs relating to commissions paid on Coventry policies. *Id.* According to Plaintiff, he never wrote a policy for Coventry. *Id.* Mr. Hosch responded via two additional e-mails showing information Plaintiff

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[12] Rhonda Herring is Plaintiff's sister. [R. at 123-125; 127-128] Although Ms. Herring specifically stated: "our firm [Phelps Dunbar] has been retained to assist Jimmy Earl Daniels . . ." and refers to him as "our client" in her email to Greg Snowden, [R. at 141-142] Plaintiff testified at his deposition that he never retained the Phelps Dunbar firm or any attorneys at that firm to represent him and that his sister was simply doing him a favor. [R. at 123-125; 127-128]

personally placed on the Agent Trax system for multiple Coventry policies Plaintiff purportedly sold and for which Plaintiff was paid by Parker.[13] [R. at 151-152]

Undeterred, Ms. Herring responded to Parker's production of data and spreadsheets requesting yet additional data from the various carriers used to determine the amount owed. [R. at 153] In her e-mail Ms. Herring stated, "It took less than three (3) hours to gather the information directly from each company, on which we base our belief that your report is erroneous." *Id.* Mr. Snowden responded on Parker's behalf, pointing out the commission and chargeback records already furnished came directly from the carriers. [R. at 154-155] Thus, the information requested in Ms. Herring's latest e-mail had already been provided. *Id.* Mr. Snowden went on to request the contact information of the people Plaintiff had purportedly spoken to at the various carriers and indicated Parker would be happy to call them and re-verify the data previously provided. *Id.* Moreover, Mr. Snowden explained that if the charge backs shown by the carriers were incorrect, not only would Plaintiff benefit, but Parker would benefit as well, as Parker only earns a commission if Plaintiff earns a commission. *Id.* Thus, Parker was

[13] Parker paid Plaintiff advance commissions on the listed Coventry policies because Plaintiff entered them in the Agent Trax system as having been sold by him. *Id.* There are a couple of possible explanations for Plaintiff's misunderstanding and/or misstatement. For example, it is possible that Plaintiff input the wrong company code into the system. This would cause an advance commission be paid and, ultimately, a charge back when no earned commission was paid by Coventry. Another possibility is that Plaintiff actually sold the policies and simply did not remember. Indeed, Plaintiff admitted in his deposition, contrary to the position earlier taken by him, that he may have sold some Coventry policies and did not remember. [R. at 112-113] Regardless, the documentation undisputedly shows that Plaintiff input information onto Parker's system indicating he sold several Coventry policies and, as a result, Parker paid Plaintiff advance commissions for those Coventry policies. Plaintiff admitted at deposition that if he was paid advanced commissions on Coventry policies (as the documentation reflects) that he did not sell, those commissions should be charged back to him; and, if he did sell them and the policies were bad (i.e., if he entered the wrong company code), the commissions should be charged back to him. [R. at 126] This demonstrates the amount of authority and control the agent had over advanced commissions. Plaintiff was paid based on the information placed onto the Agent Trax system whether an application was submitted to a carrier or not and whether the information was correct or not. If the application was never submitted or the information was incorrect, it may end up in a charge back, but Plaintiff would never-the-less be paid the advance commission on the front end. Hence, the need for a full reconciliation with the insurer's records to ensure all applications placed on the Agent Trax system were accounted for with the various insurers and whether the policy was good.

more than willing to cooperate with Plaintiff to attempt to establish no charge backs were owed, but that was not the case based on the information provided from the carriers. *Id.*

Thereafter, Ms. Herring broke off communication with the Defendants and never responded to Mr. Snowden's October 14, 2008 e-mail. Likewise, Plaintiff never provided the requested information. Instead, Plaintiff filed suit approximately a month later. [R. at 2] As part of his suit, Plaintiff sought a declaratory judgment "declaring and enjoining the Defendants from refusing to release him from his agency contract so that he [could] begin employment with Pennsylvania Life" and claiming Defendants were liable to him for the income he would have earned from Penn Life had he received the "release" he requested. [R. at 6]

On March 7, 2009, less than four months after Plaintiff filed suit, Plaintiff went to work for Penn Life in the exact same position he was offered in October of 2008. [R. at 158-159] Consequently, Plaintiff conceded in his briefing that his claim for declaratory judgment was moot. [R. at 431] Notably, Defendants did not provide Plaintiff the requested "release" prior his going to work for Penn Life in March of 2009. Rather, Plaintiff terminated his contracts and appointments with the various insurers he contracted with (naming Parker as his FMO), a process he began in April of 2008 (*see* footnote 10, *supra*) well before he ever requested the "release" from Defendants, and then re-contracted with those carriers (without listed Parker as his FMO). Penn Life – which required the "release" to hire Plaintiff in the first place – then choose to ignore and/or waive its "release" requirement policy and contracted with Plaintiff as an independent agent working in the same position (and earning the same amounts) he would have earned had they chose to contract with him in October of 2008. [R. at 158-159]

II. PROCEEDINGS BELOW

Plaintiff filed this lawsuit on November 19, 2008. [R. at 2] Plaintiff asserted two breach of contract theories in his Complaint. First, Plaintiff alleged that Defendants owed him "fees" in the amount of $325.00 for each application he submitted that was not paid.[14] [R. at 5] Second, Plaintiff alleged that Defendants refused to provide him a "release" (without him first signing a promissory note) so he could work for Penn Life. *Id.* Plaintiff claimed that same alleged conduct constituted "bad faith and malicious conduct" entitling him to punitive damages. *Id.*

After proceeding through discovery, Defendants sought summary judgment pointing out, as to Plaintiff's first theory that: (1) all of the evidence indicated Plaintiff owed Parker money for charge-backs, not the other way around; (2) there was no evidence – other than Plaintiff's unsupported belief – that Parker owed him money; and (3) Plaintiff's unsupported belief was insufficient to withstand Defendants' documentary evidence. With regard to Plaintiff's second theory, Defendants pointed out: (1) the "release" requirement was a Penn Life requirement; (2) there was no contractual term between Plaintiff and Defendants that addressed a release; and (3) the purpose of the release – as stated by Sutter Smith and Penn Life – was to indicate Plaintiff did not owe Defendants money from charge backs, which Defendants could not truthfully state.[15]

Defendants' motion was fully briefed by the parties, the trial court heard oral argument by both sides, and Plaintiff submitted additional "proof" following the hearing (which Defendants did not oppose) in attempts to shore up his claims. The trial court ultimately determined, however, (and correctly so) that "the undisputed evidence fails to establish any support for Plaintiff's [first breach of contract theory]" [R. at 434] and that "Plaintiff . . . failed to present any evidence of a contractual obligation by Parker to provide Plaintiff with a release [in support of his second breach of contract theory, and] . . . therefore, there [could] be no breach" of contract. [R. at 436] Accordingly, the trial court granted Defendants' motion as to both

[14] Plaintiff appears to have abandoned this theory on appeal as he does not address it, at all, in his brief. However, Defendants will address it briefly out of an abundance of caution.

[15] Defendants also pointed out the complete lack of proof supporting a claim for punitive damages, the complete lack of proof to allow Parker's corporate veil to be pierced to generate liability against Liberty or Ken Parker, and the complete lack of proof that Ken Parker played any role in the alleged conduct.

Plaintiff's breach of contract theories and denied the balance of Plaintiff's claims as moot. Plaintiff then filed this appeal arguing that the trial court erred in dismissing his claim for breach of the implied duty of good faith and fair dealing. Notably, Plaintiff did not appeal the trial court's judgment that Defendants did not breach any contract with Plaintiff.

STANDARD OF REVIEW

Appellate review of a trial court's grant of summary judgment is *de novo*. *Arcadia Farms P'ship v. Audubon Ins. Co.*, 2012 Miss. LEXIS 10, *10 (Miss. Jan. 5 2012) (citing *Sweet v. TCI MS, Inc.*, 47 So.3d 89, 91 (Miss. 2010) (citing *In re Estate of Laughter*, 23 So.3d 1055, 1060 (Miss. 2009))). Rule 56 of the Mississippi Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The movant bears the burden of demonstrating that no genuine issue of material fact exists and that he is entitled to a judgment as a matter of law. *Johnson v. Burns-Tutor*, 925 So.2d 155, 157 (Miss. Ct. App. 2006). Once that burden is met, "Rule 56 mandates that the party opposing [summary judgment] . . . be diligent. Mere general allegations which do not reveal detailed and precise facts will not prevent the award of summary judgment. The party opposing the motion [here, Plaintiff] is required to bring forward *significant probative evidence* demonstrating the existence of the triable issue of fact." *Brown v. Credit Center, Inc.*, 444 So. 2d 358, 364 (Miss. 1983). The non-movant may not rely on mere allegations or denials in his pleadings to create a question of fact. Miss. R. Civ. P., 56(e); *Maxwell v. Baptist Mem. Hosp.-Desoto, Inc.*, 15 So.3d 427, 433 (Miss. Ct. App. 2008). Moreover, any factual issue created must involve a "material" fact; disputes concerning non-material facts are irrelevant for summary judgment purposes. *Miss. Rd. Supply Co. v. Zurich-Am. Ins. Co.*, 501 So.2d 412, 414 (Miss. 1987). A "material" fact tends to resolve the issues, or at least one of the issues, properly raised by the parties. *Id.* If the non-movant to does not meet the movant's evidentiary showing, summary judgment is proper.

SUMMARY OF THE ARGUMENT

Plaintiff's Complaint sets out two breach of contract theories. The trial court, however, determined that there was no evidence to support either of Plaintiff's claims for breach of contract and, as such, granted Defendants summary judgement as to both. Moreover, the trial court dismissed the balance of Plaintiff's claims as moot. Plaintiff does NOT take issue with the Court's finding that *there was NO breach of contract*. Rather, the sole issue Plaintiff raises in this appeal is whether the trial court erred in dismissing his claims for *breach of the implied duty of good faith and fair dealing*. Id. at ¶¶ 10 and 14. There are several legal and factual problems with Plaintiff's theory in this appeal which mandate the trial court's dismissal be affirmed.

Legally speaking, there was no implied duty of good faith a fair dealing in this case. ***First***, Mississippi law is clear in stating that the implied duty of good faith and fair dealing only arises in connection with an *existing contract*. Plaintiff's allegations are equally clear that he and Defendants "agreed to cancel [their] arrangement" and that Plaintiff ceased selling insurance for Defendants in December of 2007. Thus, there was no *existing contract* in October of 2008 when Plaintiff requested the "release," some ten months later. ***Second***, Mississippi law is clear in stating that in order to have a breach of the implied duty of good faith and fair dealing one must first establish a breach of contract. Here, as determined by the trial court, there was no breach of contract. Plaintiff does not challenge that finding in this appeal. Consequently, there can be no finding that there was a breach of the implied duty of good faith and fair dealing.

Factually speaking, (even if the implied duty of good faith and fair dealing exists in this context) there was no breach of the implied duty of good faith a fair dealing in this case. In support of his theory, Plaintiff argues that Defendants were required to give him a "release" so he could work for Penn Life but, rather than giving Plaintiff a release, Defendants took the opportunity to try to "extort" money from him. There is absolutely NO support for these accusations in the record. In fact, the record evidence clearly demonstrates the opposite:

(1) There was NO contractual provision between Plaintiff and Defendants which required Defendants to give Plaintiff a release or even discusses a "release."

(2) The release requirement Plaintiff points to is a Penn Life requirement, not a requirement of the Defendants.

(3) According to Penn Life (and, specifically, Sutter Smith, the individual who communicated the Penn Life "release" requirement to Plaintiff) the "release" was to establish that Plaintiff did not owe any money to Defendants, not to establish the Plaintiff had been released from any alleged exclusive agency agreement with the Defendants.

(4) Penn Life ultimately hired Plaintiff in the exact same position he claims he lost out on (allegedly due to Defendants' failure to provide him with the aforementioned release) *without a release from Defendants.*

(5) It benefited not only Plaintiff, but Defendants as well, if Plaintiff did not owe charge backs (as the insurance carriers would owe Defendants an override commission if the policies remained in effect and there was no charge back).

(6) Plaintiff was asked numerous times to produce information indicating that he did not owe charge backs, but Plaintiff NEVER produced anything indicating Defendants owed him money (even when faced with Defendants' motion for summary judgment which pointed out the same).

Every single one of these facts is supported by the record evidence and is undisputed by Plaintiff. Moreover, Defendants' regularly kept business records, as confirmed by the records of the various independent insurance companies involved, demonstrated that at the time Plaintiff requested a "release" from Defendants, Plaintiff owed Defendants over $24,000.$^{\underline{00}}$ in charge backs. Although Plaintiff "disputed" this fact at the summary judgment stage, he provided NO evidence at all to support his position despite being faced with Defendants' proof on the issue. As such, summary judgment was proper and should be affirmed.

ARGUMENT

At the very outset, it should be noted that, although the entirety of Plaintiff's appeal rests upon a single claim that Defendants breached the implied duty of good faith and fair dealing, Plaintiff points to no authority that indicates a duty of good faith and fair dealing actually exists in the specific context presented by this case. Rather, Plaintiff simply cites to more-than-twenty-year-old case law for the proposition that "all contracts contain an implied covenant of good faith and fair dealing in performance and enforcement." *See* Brief of Appellant, p. 6 (citing *Morris v. Macione*, 546 So.2d 969, 971 (Miss. 1989)).

As this Court recognized nearly ten years ago, although the Courts are prone to repeat the generic phrasing: "The Supreme Court has receded from [the] view [that all contracts contain an implied covenant of good faith and fair dealing]." *Lippincott v. Miss. Bureau of Narcotics*, 856 So.2d 465, 467 (Miss. Ct. App. 2003) (citing *Hartle v. Packard Electric*, 626 So.2d 106, 100 (Miss. 1993)). *See also Cothern v. Vickers*, 759 So.2d 1241, 1248 (Miss. 2000). Indeed, the Supreme Court has specifically spoken to the issue in the field of at-will employment relationships. In *Young v. North Miss. Med. Ctr.*, the Court stated:

> There are numerous Mississippi contract cases that state that all contracts contain an implied duty of good faith and fair dealing, but this Court has never recognized a cause of action based on such a duty arising from an employment at-will relationship. This Court has specifically held that at-will employment relationships are not governed by a covenant of good faith and fair dealing . . .

783 So.2d 661, 663 (Miss. 2001) (citing *Cothern*, 759 So. 2d at 1248; *Slatery v. Northeast Miss. Contract Procurement, Inc.*, 747 So. 2d 257, 259 (Miss. 1999); *Hartle*, 626 So. 2d at 110; *Perry v. Sears, Roebuck & Co.*, 508 So. 2d 1086, 1089 (Miss. 1987)).

To be absolutely clear, Plaintiff was NOT Defendants' employee. As stated previously, it is undisputed that Plaintiff was an independent contractor. [R. at 3 and 107] However, like an employee at will, the parties had an "arrangement" whereby Plaintiff rendered services and was compensated by Parker; there was no contract that guaranteed or mandated that the parties' "arrangement" would extend for any specified period of time; there was no contract that stated that the "arrangement" would only be terminated for specified reasons; and there was no contract that limited either party's ability to terminate the "arrangement," at will, for any reason or even no reason at all. In other words, although Plaintiff was not an employee, the facts of this case line up far more closely with an employee at-will analysis than it does with the facts set forth in *Morris v. Macione*, as cited by Plaintiff.[16] Plaintiff has provided no cases and no reasoning why the duty of good faith and fair dealing should extend to this context.

Clearly, if an implied duty of good faith and fair dealing never arose in this context, then Plaintiff's claim for the same was properly dismissed and the trial court's ruling should be affirmed. Even if the implied duty of good faith and fair dealing can exist in this specific context, however, the law and facts make clear that it was not breached. Thus, Plaintiff's claim for the same was still properly dismissed and the trial court's ruling should still be affirmed.

I. Plaintiff's Claim for Breach of the Implied Duty of Good Faith and Fair Dealing Fails, as a Matter of Law, Because There Was No Duty That Required Defendants Give Plaintiff a "Release."

Mississippi law is clear that the implied duty of good faith and fair dealing *only* arises in connection with an *existing contract*. *Am. Bankers' Ins. Co. v. Wells*, 819 So.2d 1196, 1206 (Miss. 2001); *Cothern*, 759 So.2d at 1248 ("The implied covenant operates *only* where there is already an *existing contract*."); *Howard v. CitiFinancial, Inc.*, 195 F.Supp.2d 811, 824 (S.D. Miss. 2002). *See also Smith v. Tower Loans of Miss., Inc.*, 216 F.R.D. 338, 358 (S.D. Miss. 2003) ("The covenant [of good faith and fair dealing] runs . . . with respect to 'performance and

[16] *Macione* dealt with a situation in which the current shareholders of a corporation were attempting to transfer all the assets of the corporation to another entity solely to avoid the financial obligations the corporation – and its shareholders – owed to a former shareholder.

enforcement" of the contract, not to its negotiation or formation."); *Howard*, 195 F.Supp.2d at 824; *Baldwin v. Laurel Ford Lincoln-Mercury, Inc.*, 32 F.Supp.2d 894, 899 (S.D. Miss. 1998). If there is no *existing* contract, there is no implied duty of good faith and fair dealing. Put simply, the implied duty rises and falls with the contract itself.

The undisputed facts of this case indicate that, although Plaintiff at one time had an agreement with Defendants to sell insurance, "they agreed to cancel that arrangement" in late 2007. *See* Brief of Appellant, p. 6. And, in fact (as stated in Plaintiff's brief): "In December 2007, Jimmy Earl Daniels [i.e., Plaintiff] stopped writing business through Parker and Associates, Inc." *Id.* at 3. In other words, the "arrangement" ceased to exist in December of 2007. Yet, Plaintiff did not request a "release" from Defendants until October of 2008, some ten months after the parties "agreed to cancel [the] arrangement." *Id.* at 3 and 7.

Plaintiff argues that the purpose of the "release" was to relieve "other employers desiring to hire [Plaintiff of their concerns] about their liability if they hired him, absent formal acknowledgement that the exclusive agency had been cancelled," thereby implying that the implied duty should extend beyond the actual term of the parties' "arrangement" and relationship. *See* Brief of Appellant, p. 6. Plaintiff's argument in this regard is a red-herring aimed at distracting the Court from the fact that there was NO contractual term between Plaintiff and Defendants that required, or ever even discussed, a release. [R. at 107-110] Moreover, Plaintiff's argument is wholly unsupported by the record evidence and, indeed, is disproven by the record evidence. Plaintiff's argument is fatally flawed in two distinct ways.

First, as addressed *infra*, Sutter Smith (the Penn Life representative that communicated the release requirement to Plaintiff) and Stephen Voss (Penn Life's Human Resources Director and Assistant Vice President) both confirmed why the release was wanted and that it was NOT to "acknowledge that [some alleged] exclusive agency [agreement] had been cancelled," as Plaintiff argues. [R. at 157-158; 161-162] Rather, the release – which undisputedly arose due to a Penn Life requirement, not anything Defendants did – was to confirm Plaintiff did not owe Parker for charge backs, advanced expenses or any other amounts. [R. at 157-158]

Second, there never was an "exclusive agency agreement" between Plaintiff and Defendants. Plaintiff argues the "Broker or Brokerage Agreement" and/or "Agreement to Work Leads" he signed created some type of exclusive agency agreement between himself and Defendants which prevented him from working elsewhere. Plaintiff does not cite to any specific language in the "Broker or Brokerage Agreement" as limiting him, as there is none. [R. at 5] Plaintiff does cite to the following language in the "Agreement to Work Leads:"

> In consideration that I may work *the Parker and Associates Policy Holder List* of the Ken Parker Agency, *I agree to represent solely Parker and Associates when soliciting these leads*.

See Brief of Appellant, p. 2. To reach his conclusion that this language prevents him from going to work elsewhere, however, Plaintiff is forced to emphasize the language where he "agree[d] to represent solely Parker and Associates" and ignore the balance of the sentence. *Id.* Indeed, the clause immediately following the phrase Plaintiff relies on qualifies when Plaintiff was limited, stating that he was only limited to "represent solely Parker and Associates *when soliciting these leads*." [R. at 109] Similarly, the phrase immediately preceding the clause Plaintiff relies on states that Plaintiff's agreement is consideration such that he "may work *the Parker and Associates Policy Holder List*," not that he may work generally for Parker and Associates.

The "list" and/or "leads" referenced were a list of potential policy holders that could be provided, if requested, to Plaintiff by the Parker. If requested from Parker the leads were to be used to produce business for Defendants only. [R. at 108] Plaintiff, however, did not have to work leads. Indeed, the "Broker or Brokerage Agreement" Plaintiff signed specifically stated that Plaintiff had a choice as to whether or not he would work leads and, if he chose to work leads, he was free to choose where he purchased those leads from. [R. at 107] In other words, Plaintiff was limited to soliciting for Parker *only* if: (1) he chose to purchase leads, (2) he chose to purchase those leads from Parker *and*, (3) he was actually soliciting those leads purchased from Parker. The Agreement to Work Leads did not otherwise limit Plaintiff. [R. at 109] If Plaintiff did not purchase leads, he was not limited; if he purchased leads from someone other than Parker, he was not limited; if he purchased leads from Parker, but was not working them, he was not limited. The Agreement to Work Leads, thus, does not prevent Plaintiff from going to work for another field marketing organization or upline hierarchy.

In sum, as Plaintiff's "arrangement" with Parker undisputedly ceased to exist ten months prior to Plaintiff requesting a "release," there was no implied duty of good faith and fair dealing at the time the "release" was requested. The implied duty ceased to exist, as a matter of law, when the parties' "arrangement" ceased to exist some ten months earlier. Consequently, Defendants could not have breached the implied duty by failing to provide a release.

II. Plaintiff's Claim for Breach of the Duty of Good Faith and Fair Dealing Fails, as a Matter of Law, Because There Was No Breach of Contract.

Even if the duty existed in October of 2008, Plaintiff's claim for breach of the implied duty of good faith and fair dealing cannot get off the ground without Plaintiff first establishing the underlying contract was breached. Indeed, as this Court has previously held, a "claim of breach of the covenant of good faith . . . asserts a [claim in] tort, *one flowing from tortuous breach of contract.*" *Lippincott*, 856 So.2d at 468 (citing *Braidfoot v. William Carey College*, 793 So.2d 642, 651 (Miss. Ct. App. 2000)). Obviously, to have a *tortuous* breach of contract, you must first have a breach of contract. *Eselin-Bullock & Assoc. Ins. Agency, Inc. v. Nat. Gen. Ins. Co.*, 604 So.2d 236, 240 (Miss. 1992) (citing *Southern Natural Gas. Co. v. Fritz*, 523 So.2d 12, 19-20 (Miss. 1987)). Thus, if there was no breach of contract, there can be no breach of the duty of good faith and fair dealing. *See e.g., Robinson v. Southern Farm Bureau Cas. Co.*, 915 So.2d 516, 520-521 (Miss. Ct. App. 2005)(dismissing claim for breach of the duty of good faith and fair dealing because there was no breach of contract); *Frye v. Southern Farm Bureau Cas. Co.*, 915 So.2d 486, 492 (Miss. Ct. App. 2005) (same). Indeed, "in an 'ordinary' contract situation, a breach of the covenant is a breach of the contract itself." *Cenac v. Murry*, 609 So.2d 1257, 1274 (Miss. 1992). Here, there was no breach of contract and, thus, no breach of the implied duty of good faith and fair dealing.

A. Plaintiff is Procedurally Barred from Even Arguing That a Breach of Contract Occurred In this Case.

As an initial matter, it should be noted that Plaintiff is procedurally barred from even arguing there was a breach of contract. Rule 28(a)(3) of the Mississippi Rules of Appellate Procedure states: "No issue *not distinctly indentified* shall be argued by counsel, except upon a request of the court, but the court may, at its option, notice a *plain error* not identified or distinctly specified." This Court has applied the rule exactly as written, *see e.g., Reed v. State*, 987 So.2d 1054, 1056-1057 (Miss. Ct. App. 2008); *Wansley v. State*, 734 So.2d 193, 199 (Miss. Ct. App. 1999), and held that "the plain error rule will only be applied when a defendant's substantive or fundamental rights are affected." *Baskin v. State*, 991 So.2d 179, 181 (Miss. Ct. App. 2008)(quoting *Flora v. State*, 925 So.2d 797, 811 (Miss. 2006)).

Here, Plaintiff's Complaint set out two claims for breach of contract and a separate claim for tort (i.e., his claim for breach of the duty of good faith and fair dealing), to potentially enable him to receive a punitive damage instruction. The trial court determined, however, that there was no evidence to support either of Plaintiff's claims for breach of contract and, as such, granted Defendants summary judgement on both of those claims. The trial court went on to hold that: "Because the Court finds that the Defendants are entitled to summary judgment as to the breach of contract claims, the remaining requests for relief as to punitive damages [i.e., Plaintiff's claim for breach of the duty of good faith and fair dealing] . . . are moot." [R. at 436]

Notwithstanding the fact that he pled two sets of claims – one contractual, the other tortuous – in his Complaint, both of which were dismissed, Plaintiff only assigns error to the dismissal of his tort claims. Specifically, in his Statement of Facts Plaintiff identifies the sole issue in this appeal as being: "Whether the lower court erred in granting summary judgment in favor of [Defendants] when there were genuine issues of material fact as to *whether [Defendants] breached their duty of good faith and fair dealing*." *See* Brief of Appellant, p. 1. Plaintiff repeats the sole issue he raises in his Summary of the Argument:

> The lower court erred in granting summary judgment *as to Jimmy Earl Daniels' claim that [Defendants] breached the implied duty of good faith and fair dealing* in refusing to release him from their exclusive contract and in trying to extort $24,000.00 from which they now admit he did not owe. Whether [Defendants] behaviour constituted *a breach of that duty* is a question of fact for a jury to decide.

See Brief of Appellant, p. 5 (Summary of the Argument). Plaintiff's argument is, likewise, limited to the single issue of whether the duty of good faith and fair dealing was breached. Indeed, Plaintiff does not point to a single contractual term in his brief that he claims was breached. To the contrary, (as discussed above) Plaintiff specifically points out that he and Defendants "agreed to cancel [their] arrangement" and that Plaintiff ceased selling insurance for Defendants in December of 2007, some ten months before Plaintiff requested a "release."

Consequently, inasmuch as the trial court specifically held that there was NO evidence to support a breach of contract [R. at 432-436], and Plaintiff has NOT "distinctly identified" such as an issue or even argued to the contrary in his brief, Plaintiff should be procedurally barred in this appeal from arguing there was a breach of contract. Further, as a breach of contract is a prerequisite to the establishment of a claim for breach of the implied duty of good faith and fair dealing (and Plaintiff is barred from arguing such exists in this appeal), Plaintiff's appeal should be summarily dismissed and the trial court's ruling summarily affirmed.

B. There Is No Evidence That a Breach of Contract Ever Occurred In This Case.

Even if Plaintiff were not barred from arguing there was a breach of contract, as the trial court correctly determined, there is no evidence to support a breach of contract claim. Plaintiff has wholly failed to demonstrate otherwise, either in this appeal or below.

i. The record evidence demonstrates that when Plaintiff requested a "release" Plaintiff owed Defendants money, not the other way around. Thus, as the trial court held, Plaintiff's first breach of contract theory must necessarily fail.

Plaintiff first complains that Defendants owed him "fees" in the amount of $325.00 for each application he submitted that was not paid.[17] Plaintiff alleges that Parker withheld 10, 25 and 35 percent of those fees to be placed into an escrow account to be utilized to offset charge backs.[18] [R. at 3-4] Plaintiff alleges that when his employment ended, he was owed the money in the escrow account and demanded the same, but Parker refused to turn the same over to him. [R. at 4] According to Plaintiff's Complaint, there was approximately $30,000 withheld and placed into "escrow" from November of 2005 through December of 2007. [R. at 5] According to Plaintiff, Parker's refusal to release the funds to him from the "escrow" account after he left Parker constituted a breach of contract and entitled him to damages. *Id.*

Plaintiff's legal theory is not supported by the facts and evidence. Plaintiff himself admitted during his deposition that he understood precisely how the payment system worked,

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[17] As stated previously, Plaintiff appears to have abandoned this theory on appeal as he never mentions or argues the same in his brief. However, inasmuch as the facts involved with this claim demonstrate both that there was no breach of contract and that there was no bad faith in refusing the "release" (the single claim Plaintiff raises in this appeal), Defendants address it here out of an abundance of caution and to fully complete the picture for the Court.

[18] It should be remembered that the funds withheld and placed into escrow were ***unearned*** commissions.

how charge backs worked and how the "escrow" account worked. Specifically, with regard to the payment structure, the following exchange occurred at Plaintiff's deposition, evidencing Plaintiff clearly understood how he was paid and that he would have charge backs:

> QUESTION: How were you paid?
>
> ANSWER: I was paid according to the application on what I wrote.
>
> QUESTION: All right. When were you paid?
>
> ANSWER: I was paid – let's say I turned it in on Friday, there was a week delay and it was the next Friday that I would get my commission.

[R. at 114]

> QUESTION: Who paid you the commission?
>
> ANSWER: The commission come from The Liberty Group. They had another name to start off with.
>
> QUESTION: But it came from Parker?
>
> ANSWER: Yeah.
>
> QUESTION: It did not come from the company [i.e., the insurance carrier]?
>
> ANSWER: No, sir.
>
> QUESTION: And, in fact, your contracts with Parker and the companies that you wrote the MA contracts, they provided that Parker would pay you upon your submittal?
>
> ANSWER: Yes, sir. That's right.

QUESTION: And you understood, I presume, that the company then at some point would pay Parker its share and then reimburse Parker on what they would pay you?

ANSWER: That's right.

QUESTION: That your understanding?

ANSWER: The company would write Parker a check and Parker would write me a check.

QUESTION: All right. But your money came from Parker?

ANSWER: Yes, sir.

QUESTION: Now, is there a word – you've been an insurance agent from sometime. There is a word for that kind of payment, is there not, on any sort of insurance policy?

ANSWER: Yes, sir.

QUESTION: What is that word?

ANSWER: Advance.

QUESTION: It's an advanced commission?

ANSWER: That's right.

QUESTION: And what does that mean – how does that – you are familiar with the term earned commission?

ANSWER: That's right.

QUESTION: How does an advanced commission differ from an earned commission?

ANSWER: An earned commission, let's say if you was on a 25 percent contract and you sold $100 dollar policy, an earned commission you would get 25 percent of whatever the premium is, you would get that every month as an earned commission, it's as earned.

QUESTION: All right. How does that differ from an advanced commission?

ANSWER: An advanced commission is – let's say you are on nine-month advance, they would pay you the earned amount on a nine-month, so you would take the earned amount times nine.

QUESTION: And suppose the policy does not stay on the books for nine months.

ANSWER: Then let's say if it stayed on six months, then you would be charged back the three months that it did not pay up.

QUESTION: So if the policy doesn't stay on, the agent has to pay back to the person that paid him the part of the commission that was not, in fact, earned?

ANSWER: Exactly.

QUESTION: That's the way the system works?

ANSWER: That's the way it works.

QUESTION: That's the way MA worked?

ANSWER: Yes, sir.

QUESTION: And Parker paid you – or The Liberty Group paid you advanced commissions?

ANSWER: That's right.

QUESTION: Now, you mentioned chargebacks?

ANSWER: Uh-huh.

QUESTION: What is a chargeback?

ANSWER: A chargeback is when the company expects you to pay the money that it advanced back if the policy didn't meet the requirements.

QUESTION: Okay. And, again, Parker is who paid you with respect to what you did?

ANSWER: Yeah.

QUESTION: If the policies, the MA policies, did not meet the requirements, you would expect to be charged back from Parker?

ANSWER: Absolutely.

[R. at 115-117]

QUESTION: . . . So obviously in your relationship with Parker, you had an understanding that under certain circumstances you would have to pay back chargeback advanced commissions.

ANSWER: Yes, sir.

[R. at 118]

In addition to clearly understanding that he was being paid advanced, ***unearned*** commissions by Parker and that if the policy did not meet the requirements (and, thus, the insurer did not pay Parker commissions relating to the same) he would be required to pay Parker back, Plaintiff clearly understood that the escrow account was established to assist in offsetting those charge backs. [R. at 119-120] As admitted in his Complaint, Plaintiff made no objection to Parker setting up the "escrow" account, [R. at 3-4] because Plaintiff understood the funds were utilized – on his behalf and to his benefit – to pay, or at least help offset, the charge backs he owed to Parker. [R. at 119-120] The funds in the escrow account were utilized to do exactly that – pay back charge backs as they became due and owing to Parker. [R. at 85-86]

After Plaintiff ceased writing business through Parker, the balance of his escrow account was applied to help offset the debt owed to Parker. *Id.* The funds held in the escrow account, however, were not sufficient to pay the full debt owed. *Id.* According to Parkers' records and the records of the various insurers at issue – which were made available to Plaintiff through the various e-mails sent to Ms. Herring in October of 2008, [R. at 143-144] – after the various charge backs were accounted for and the funds in Plaintiff's escrow account were applied to reduce the total amount owed, Plaintiff owed Parker over $24,000. [R. at 85-86]

Defendants submitted evidence in its motion for summary judgment demonstrating that according to its records, <u>*and the records of the various insurers at issue*</u>, Plaintiff owed Parker over $24,000 in October of 2008. [R. at 82-106] Plaintiff did NOT bring forth the first piece of evidence indicating otherwise. Indeed:

- Despite Plaintiff stating as early October 14, 2008 that he was working on an "item by item audit," [R. at 147] no such "audit" was ever produced to Defendants in this lawsuit or otherwise.

- Despite Defendants' October 14, 2008 request that Plaintiff provide the documentation he was relying on to state that Parker owed him money, not the other way around, [R. at 154] no such documents were ever produced to Defendants in this lawsuit or otherwise.

- Despite Plaintiff stating in discovery that he would "identify and supplement documents . . . when received from the providers" that indicate there was a chargeback or other fee or expense he was improperly charged for, [R. at 167] no such documents were ever produced to Defendants in this lawsuit or otherwise. And,

- Despite being faced with Defendants' summary judgment evidence and motion, Plaintiff failed to bring forward a single document showing that Parker owed him money or to bring forth anything other than his own personal unsubstantiated conclusions.

In short, the record evidence – derived from the documents Defendants maintained in their regular course of business and confirmed by the documents maintained by the insurers at issue in their regular course of business – indicates that Plaintiff owed Parker approximately $24,000 in October of 2008. There is NO record evidence that indicates Defendants owed Plaintiff.

Plaintiff's only response to Defendants' proof is that the amount owed has changed since October of 2008. *See* Brief of Appellant, pp. 4, 7-8. Indeed, the amount Plaintiff owed Parker has changed since October of 2008. Such, however, does not establish (as Plaintiff argues) that he did not owe Parker approximately $24,000 in October, 2008. As Cathy Shinagawa explained:

> In October of 2008 when Daniels requested a release from Parker, Daniels had an outstanding balance owed to Parker on his debit ledger in excess of $24,000. . . *Since October of 2008, the total outstanding balance owed to Parker by Daniels has steadily decreased due to, among other things, renewal commissions paid to Parker on policies sold by Daniels and override commissions for agents in his down-line. The balance owed changes, sometimes weekly, anytime a renewal commission is paid on a policy sold by Daniels or his down-line agents for override commissions* . . .

[R. at 84] In other words, Parker has continued to credit Plaintiff's account with renewal commissions on policies he sold that have been renewed by the policy holders and with override commissions for policies sold by other agents that Plaintiff managed.[19] Obviously, if an account

[19] Plaintiff states that, "after the Court's ruling below, [Defendants] actually admitted that they owed [Plaintiff] money and forwarded him a check in the amount of $441.00." *See* Brief of Appellant, p. 8 (footnote 1). There is no evidence in the record regarding any such payment and Plaintiff failed to raise it below. As such, it cannot properly be considered. Notwithstanding its impropriety, this simply proves the point. Defendants kept detailed records – as they are required – on each policy issued, including the selling and any managing agents that are entitled to a commission (whether advanced, renewal or override). Over the nearly three years following October of 2008, Defendants continued to apply renewal commissions and override commissions to Plaintiff's account as they were earned. Eventually, the renewal and override commissions paid off the negative balance on Plaintiff's account created by the

is repeatedly credited, the amounts in that account will change. Such is exactly what happened here. That does not change the fact that Plaintiff's account was negative in October of 2008 when he requested the release – meaning Plaintiff owed Parker money at that time. The converse (Plaintiff's argument that Parker owed him money) cannot simultaneously be true. Thus, as the trial court found, there is no evidence that Parker breached its contract with Plaintiff.

ii. The record evidence demonstrates Parker did not breach any contract by failing to give Parker a "release." Parker had no obligation to provide Plaintiff with a release, contractual or otherwise; the "release" requirement was a Penn Life requirement, not a Parker requirement; and, Plaintiff owed Parker money when he requested a release, thereby rendering the release inappropriate.

Plaintiff's second breach of contract theory is based upon his allegations that Defendants failed to give him a release so he could go to work for Penn Life. [R. at 5] According to Plaintiff's Complaint, Penn Life agreed to hire Plaintiff as a manager, estimating he would make approximately $150,000 per year working for them. [R. at 4] Plaintiff alleges that Penn Life required him to obtain a release from Parker before he began work for them, *Id.*, but Parker refused to give him a release because he owed approximately $24,000. [R. at 5]

(a) There was no contractual term requiring or governing the circumstances under which Defendants would be required to provide Plaintiff a release, as the "release" requirement was a requirement of a wholly separate and distinct company (Penn Life).

It is axiomatic that, in order to be held liable for breach of contract, the term the party is alleged to have breached must have been agreed upon by the parties. A party cannot be held liable for breaching a contract to which he is not a party . *See e.g., Alcom Elec. Exchange, Inc. v.*

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charge backs. Thereafter, as additional commissions came due, they were paid to Plaintiff. This in no way evidences an "admission" that Parker owed Plaintiff money in October, 2008.

Burgess, 839 F.2d 964 (5th Cir. 1988) (holding an agent for a disclosed principal not liable for breach of a contract entered by the principal, to which he is not a party); *Gardener v. Jones*, 464 So. 2d 1144 (Miss. 1985) (same); *Griffin v. Ware*, 457 So. 2d 936 (Miss. 1984) (same); *Wood v. Mississippi Power Co.*, 146 So. 2d 546 (Miss. 1961); *Shemper v. Hancock Bank*, 40 So. 2d 742 (Miss. 1949); *Ketcham v. Mississippi Outdoor Display*, 33 So. 2d 300 (Miss. 1948).

As stated previously, it is undisputed that Plaintiff had no employment contract with Parker; he was an independent contractor. Further, Plaintiff did not have a noncompetition or other like agreement whereby Parker could restrict Plaintiff's employment. And, still further, there was no agreement that indicated that Parker must, or under what circumstances Parker should, provide Plaintiff with a release following the termination of their relationship. In other words, there is no contractual term or agreement that Parker could have possibly violated that could give rise to a claim for breach of contract for allegedly refusing to give Plaintiff a release.

Indeed, the requirement that Plaintiff procure a release from Parker was, undisputedly, a requirement that Penn Life – not Parker – placed on Plaintiff. [R. at 4; 83; 157-158; 435] Plaintiff testified at deposition that Sutter Smith made the Penn Life offer to him. [R. at 129-130] Sutter Smith swore under oath that the release requirement was a requirement ***Penn Life*** placed on Plaintiff's offer. [R. at 157-158] Moreover, Plaintiff conceded at the summary judgment hearing that the release requirement was a Penn Life requirement and was not addressed in any agreement between Plaintiff and Defendants. [R. at 435] Parker cannot be held liable for breach of contract for failing to abide by another company's policy.

(b) Parker could not honestly provide a release, given the stated purpose of the same.

Even if there was some duty for Parker to provide Plaintiff with a release (which is denied), that duty would not arise given the stated purpose of the release. Smith (who made the

Penn Life offer and communicated the release requirement) [R. at 129-130] averred that a release was required as an indication that "[Plaintiff] had made appropriate arrangements with his prior marketing organization or upline hierarchy *to meet any financial obligations he had with that organization* or agency, such as payment of lead expenses, compensation advances, loans, administrative overhead, postal charge, etc." [R. at 158] Stephen Voss, the Human Resources Director and Assistant Vice President of Penn Life's parent company, Universal American, confirmed Smith's understanding of the purpose of the release. [R. at 161-162] Since both Parker's records and the records of the various insurers indicated that Plaintiff owed Parker money for which Plaintiff refused to make arrangement, and Plaintiff failed to provide any records at all indicating he did not owe Parker the charge backs, Parker could not honestly provide the requested release given its intended purpose. In essence, Plaintiff wishes to make Parker liable for refusing to ignore all of the documentation it had (and verified with independent insurers) that indicated that Plaintiff owed Parker money and, indeed, state the exact opposite to Penn Life. This, clearly, would have been inappropriate.

C. Conclusion

In sum, Plaintiff has not established, attempted to establish or even argued in this appeal that Defendants breached any contract with Plaintiff. The trial court correctly found there was no breach of contract. Thus, as proving a breach of contract is a fundamental prerequisite to establishing a claim for breach of the duty of good faith and fair dealing, the trial court's judgment should be affirmed and Plaintiff's appeal summarily dismissed.

III. Plaintiff's Claim for Breach of the Duty of Good Faith and Fair Dealing Fails, as a Matter of Law, Because There Was No Agreed Upon Purpose.

Even if the duty of good faith and fair dealing can exist in this context, there was no breach of the covenant here as there was no "agreed upon purpose" that required Parker to give

Plaintiff a "release." The Mississippi Supreme Court has stated that "good faith is the faithfulness of *an agreed purpose between two parties*, a purpose which is consistent with justified expectations of the other party." *Robinson*, 915 So.2d at 520; *Williams*, 891 So.2d at 170; *Cenac*, 609 So.2d 1272. Stated otherwise, "the implied covenant of good faith and fair dealing holds that neither party will do anything which injures the right of the other *to receive the benefits of the agreement*." *Cothern*, 759 So.2d at 1248. Consequently, this Court has held that "we [will] imply into contracts *only* those terms *as may be expected to fulfill the parties' reasonable expectations*." *Lippincott*, 856 So.2d at 468 (citing *UHS-Qualicare v. Gulf Coast Comm. Hospt.*, 525 So.2d 746, 755 (Miss. 1987)).

The parties' agreement in this case is set forth in several documents in the record. [R. at 107-110] Those documents set out, in essence, that Plaintiff was an independent contractor, that Parker, as Plaintiff's FMO, would provide Plaintiff with marketing assistance, including leads if Plaintiff desired, and support services to enable him to sell various insurance products. *Id.* The various agreements set forth numerous specific agreements regarding E&O coverage, miscellaneous expenses, the purchase and use of lead sheets, etc., for the various products to be sold. *Id.* Notably missing from the various agreements is any mention of a "release" (as Plaintiff has conceded that the "release" requirement was simply something Penn Life required). [R. at 435] Moreover, all of the terms are directed at the parties' responsibilities while the parties' relationship remained intact. [R. at 107-110] None of the agreements in the record address what would happen after the parties terminated their relationship. *Id.*

In other words, the "agreed upon purpose" evidenced by the documents in the record was for Plaintiff to sell insurance products with Parker acting as his FMO, with Plaintiff receiving an commission (to be advanced up front by Parker with the possibility of a charge back if the commission was not ultimately earned) and Parker receiving an override commission. Thus, failing to give Plaintiff a release (until arrangements had been made to take care of his charge backs) approximately ten months after the parties' arrangement ended does not violate the parties' "agreed upon purpose." Indeed, the release (which was expressly requested to allow Plaintiff to sell insurance for another company) was completely at odds with the "agreed upon purpose" of Plaintiff selling insurance products *through Parker.* Stated otherwise, failing to provide Plaintiff a release until made arrangements to take care of his charge backs did not "injure [Plaintiff's] right . . . *to receive the benefits of the agreement*" he had with Parker. Consequently, even if the duty could arise in this specific context, there is no breach of the duty of good faith and fair dealing as there was no frustration of the parties' agreed upon purpose.

IV. Plaintiff's Claim for Breach of the Duty of Good Faith and Fair Dealing Fails Because There Is No Evidence, At All, of Bad Faith.

Finally, even if the duty of good faith and fair dealing could arise in this context, even if Plaintiff could prove a breach of contract, even if Plaintiff could prove a frustration of the parties' agreed upon purpose and get past all of the other problems set forth above, there is NO evidence of bad faith. In the context of an alleged breach of the duty of good faith and fair dealing, the Mississippi Supreme Court has held that the "bad faith [alleged must be] characterized by some conduct which violates standards of decency, fairness or reasonableness." *Cenac*, 609 So.2d at 1272. Moreover, the alleged breach must be accompanied by "some intentional wrong, insult, abuse, or negligence so gross as to constitute an independent tort." *Robinson*, 915 So.2d at 520; *Frye*, 915 So.2d at 492. Indeed, as pointed out in Plaintiff's brief, "bad faith [in this context] requires a showing of more than bad judgment or negligence; rather, 'bad faith' implies some conscious wrongdoing 'because of dishonest purpose or moral obliquity.'" *See* Brief of Appellant, p. 6 (citing *Univ. of S. Miss. v. Williams*, 891 So.2d 160 (Miss. 2004); *Bailey v. Bailey*, 724 So.2d 335 (Miss. 1998); and *Empiregas, Inc. v. Bain*, 599

So.2d 971 (Miss. 1992)). Without the requisite showing of . . . bad faith . . . the implied covenant [of good faith and fair dealing cannot be breached]." *Lippincott*, 856 So.2d at 468.

As demonstrated by the record evidence discussed above, Parker's belief that Plaintiff owed it additional money in October of 2008 and its alleged refusal to provide a release as a result, even if Plaintiff had proven the same wrong (which he has wholly failed to do), was based on documentation generated by Parker in its normal course of business *and verified by obtaining information from the various insurers on a policy by policy basis*. Parker's reliance on its own business records, especially after they were verified to be in accord with the insurance carriers' records, cannot constitute bad faith. This is especially so given that: (1) as explained by Mr. Snowden to Ms. Herring, it would be financially beneficial to Parker if it could be proven that the documentation was incorrect, but there was simply no indication that was the case; and (2) Plaintiff never provided any documentation or information to Parker – other than his own wholly unsupported and self-serving statements – that indicated that Parker's records, or the information obtained from the various independent insurance carriers, was incorrect (despite Parker's requests to Plaintiff to provide the same). [R. at 154-155]

These undisputed facts clearly demonstrate there was nothing done by Parker that violates "standards of decency, fairness or reasonableness," that there was "no intentional wrong, insult, abuse, or negligence so gross as to constitute an independent tort," and there was no "conscious wrongdoing 'because of dishonest purpose or moral obliquity.'" Indeed, when viewed in light of the purpose of the release as stated by Sutter Smith and Penn Life (i.e., to establish that Plaintiff did not owe Parker) [R. at 157-158], Plaintiff essentially asks the Court to hold that Defendants committed bad faith because they refused to completely disregard their business records (as confirmed by the various insurers) and lie to Penn Life. This is completely untenable. Defendants have found no case – and Plaintiff has cited no case – (likely because none exists) where a defendant was held in bad faith because he *refused* to lie. Yet, such is exactly what Plaintiff asks this Court to do through this appeal. This appeal should be dismissed.

CONCLUSION

As established by a review of the record evidence and set forth herein, the trial court's judgment dismissing this case should be affirmed.

Respectfully submitted,

PARKER AND ASSOCIATES, INC.,
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AND DALVIN KENDALL PARKER

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CERTIFICATE OF SERVICE

I, Richard G. Norris, II, hereby certify that a true copy of the foregoing Brief of Defendants/Appellees was served on the following counsel by being deposited in the U.S. Mail, first-class postage prepaid, on this the 3rd day of February, 2012.

Honorable Robert W. Bailey
Circuit Court Judge
Tenth Circuit Court District of Mississippi
Post Office Box 1167
Meridian, Mississippi 39302-1167

TRIAL COURT JUDGE

Jim Waide
Rachel Pierce
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So certified this, the 3rd day of February, 2012.

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