

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

MICHAEL PAYMENT, M.D.

PLAINTIFF

VERSUS

1:07cv1003LTS-RHW

STATE FARM FIRE AND CASUALTY COMPANY

DEFENDANT

**ANSWER OF DEFENDANT
STATE FARM FIRE AND CASUALTY COMPANY**

Comes now the Defendant, STATE FARM FIRE AND CASUALTY COMPANY, (State Farm) by and through its attorneys, and responds to the Complaint exhibited against it as follows:

FIRST DEFENSE

The Complaint fails to state a cause upon which relief can be granted.

SECOND DEFENSE

The Defendant hereby incorporates and pleads any and all defenses listed in Rule 12(b) of the Federal Rules of Civil Procedure that may be applicable to this Cause and reserves its right to raise any objections and defenses therein stated.

THIRD DEFENSE

The Defendant, State Farm, would now answer the Complaint paragraph by paragraph as follows:

I.

The Defendant admits the allegations of paragraph 1 of the Complaint.

II.

The Defendant admits the allegations of paragraph 2 of the Complaint.

III.

The Defendant admits the allegations of paragraph 3 of the Complaint.

IV.

The Defendant admits the allegations of paragraph 4 of the Complaint.

V.

The Defendant admits that the residence was damaged on August 29, 2005, but would deny any inference as to all of the damage being insured under the State Farm Homeowners Policy, attached to the Complaint, which speaks for itself.

VI.

It is admitted Hurricane Katrina, included wind that would qualify as a windstorm, but the Defendant specifically denies that Hurricane Katrina, only included windstorm as the damage inflicted by Hurricane Katrina on the plaintiff's property, was as a result of storm surge. State Farm denies that the term "windstorm" is defined in the Insurance policy.

VII.

The Defendant denies the allegations of paragraph 7 of the Complaint.

VIII.

The Defendant admits the allegations of paragraph 8 of the Complaint

IX.

The Defendant admits that prior to purchasing the policy at issue the Plaintiff met with the State Farm Agent. The Defendant denies any allegations as to the purpose of that meeting other than the Plaintiff's desire to purchase an insurance policy to cover the residence. The Defendant denies any other allegations in Paragraph 9 of the Complaint.

X.

The Defendant denies the allegations of paragraph 10 of the Complaint.

XI.

The Defendant denies the allegations of paragraph 11 of the Complaint.

XII.

The Defendant admits that Kay Venable, acted as its agent in issuing the policy to the Plaintiff, but would deny that Kay Venable, made any false representations or any misrepresentations to the Plaintiff, as alleged in paragraph 12 of the Complaint. Further the policy contains all agreements between State Farm and Michael Payment.

XIII.

The Defendant denies the allegations of paragraph 13 of the Complaint.

XIV.

The Defendant admits the allegations of paragraph 14 of the Complaint.

XV.

The Defendant admits that storm surge flooding from hurricane Katrina caused damage to the Plaintiff's home. State Farm denies the remainder of paragraph 15.

XVI.

The Defendant admits that it has a duty to deal fairly and in good faith, and further admits that the policy speaks for itself. The Defendant denies the remaining allegations of paragraph 16 of the Complaint.

XVII.

The Defendant admits that it has a duty to investigate, and further admits that the policy speaks for itself. The Defendant denies the remaining allegations of paragraph 17 of the Complaint.

XVIII.

The Defendant denies the allegations of paragraph 18 of the Complaint.

XIX.

The Defendant denies the allegations of paragraph 19 of the Complaint.

XX.

The Defendant incorporates by reference each admission or denial to the first 19 paragraphs of the Complaint, as same are incorporated by reference in paragraph 20 of the Complaint.

XXI.

The Defendant admits that the Plaintiff and the Defendant entered into a contract, the terms of which are clear and unambiguous, for which the Plaintiff paid the premium as asserted in paragraph 21 of the Complaint.

XXII.

The Defendant denies the allegations of paragraph 22 of the Complaint.

XXIII.

The Defendant denies the allegations of paragraph of 23 of the Complaint.

XXIV.

The Defendant incorporates by reference each admission or denial to the first 23 paragraphs of the Complaint, as same are incorporated by reference in paragraph 24 of the Complaint.

XXV.

The Defendant admits the allegations of paragraph 25 of the Complaint.

XXVI.

The Defendant denies the allegations of paragraph 26 of the Complaint.

XXVII.

The Defendant denies the allegations of paragraph 27 of the Complaint.

XXVIII.

The Defendant denies the allegations of paragraph 28 of the Complaint.

XXIX.

The Defendant denies the allegations of paragraph of 29 of the Complaint.

XXX.

The Defendant incorporates by reference each admission or denial to the first 29 paragraphs of the Complaint, as same are incorporated by reference in paragraph 30 of the Complaint.

XXXI.

The Defendant denies the allegations of paragraph 31 of the Complaint.

XXXII.

The Defendant denies the allegations of paragraph 32 of the Complaint.

XXXIII.

The Defendant denies the allegations of paragraph 33 of the Complaint.

XXXIV.

The Defendant denies the allegations of paragraph 34 of the Complaint.

XXXV.

The Defendant denies the allegations of paragraph 35 of the Complaint.

XXXVI.

The Defendant incorporates each admission or denial of the first 35 paragraphs of the Complaint, as same are incorporated by reference in paragraph 36 of the Complaint.

XXXVII.

The Defendant denies the allegations of paragraph 37 of the Complaint.

XXXVIII.

The Defendant denies the allegations of paragraph 38 of the Complaint.

XXXIX.

The Defendant denies the allegations of paragraph 39 of the Complaint.

XL.

The Defendant incorporates by reference each admission or denial to the first 39 paragraphs of the Complaint, as same are incorporated by reference in paragraph 40 of the Complaint.

XLI.

The Defendant denies the allegations of paragraph 41 of the Complaint.

XLII.

The Defendant denies the allegations of paragraph 42 of the Complaint.

XLIII

The Defendant denies the allegations of paragraph 43 of the Complaint.

XLIV.

The Defendant denies the allegations of paragraph of 44 of the Complaint.

XLV.

The Defendant denies the allegations of the last numbered paragraph of the Complaint, beginning “WHEREFORE, premises considered,” and denies that it is indebted to the Plaintiff in any sum whatsoever.

FOURTH DEFENSE

The Defendant reserves the right to assert any further or additional defenses that may be developed during the course of discovery in this matter.

FIFTH DEFENSE

The Defendant is not guilty of bad faith in their dealings with the Plaintiff.

SIXTH DEFENSE

The Defendant avers that the Plaintiff has not been damaged as a result of any alleged wrongdoing on their part.

SEVENTH DEFENSE

The Defendant denies it has been guilty of any conduct, which entitles Plaintiff to recover punitive damages.

EIGHTH DEFENSE

The Defendant avers that the Complaint fails to state a claim upon which punitive damages may be awarded to the Plaintiff.

NINTH DEFENSE

The Defendant affirmatively pleads that the Plaintiff is not entitled to recover extra-contractual damages, punitive or otherwise, and that there is no basis for such a claim.

TENTH DEFENSE

The Defendant affirmatively pleads any award of punitive or exemplary damages or extra-contractual damages of any type, whether compensatory or otherwise, is precluded because State Farm clearly had, at a minimum, legitimate and arguable reasons for its conduct and decisions in this case.

ELEVENTH DEFENSE

The Defendant avers that any award of punitive damages to Plaintiff in this case will be violative of the constitutional safeguards provided to State Farm under the Constitution of the State of Mississippi.

TWELFTH DEFENSE

The Defendant avers that any award of punitive damages to Plaintiff in this case will be violative of the constitutional safeguards provided to them under the Constitution of the United States of America.

THIRTEENTH DEFENSE

The Defendant avers that any award of punitive damages to Plaintiff in this case will be violative of the Constitutional safeguards provided to them under the due process clause of the Fourteenth Amendment to the Constitution of the United States in that the determination of punitive damages under Mississippi Law is vague, is not based upon any objective standards, is in fact, standardless, and is not rationally related to legitimate governmental interests.

FOURTEENTH DEFENSE

The Defendant avers that any award of punitive damages to Plaintiff in this case will be violative of the procedural safeguards provided to it under the Sixth Amendment to the Constitution of the United States in that punitive damages are penal in nature and consequently, it is entitled to the same procedural safeguards accorded to criminal defendants.

FIFTEENTH DEFENSE

The Defendant affirmatively pleads that every element of the Plaintiff's claims for punitive damages must be proved beyond a reasonable doubt because without such proof, said claim would violate its due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and under Article 3, Section 14 of the Mississippi Constitution.

SIXTEENTH DEFENSE

Plaintiff's claim of punitive damages violates Article I, and the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the Constitution of the United States on the following grounds:

A. It is a violation of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution to impose punitive damages, which are penal in nature, against civil defendants upon the Plaintiff satisfying a burden of proof which is less than a "beyond a reasonable doubt" burden of proof required in criminal cases;

B. The procedures pursuant to which punitive damages are awarded may result in the award of joint and several judgments against multiple defendants for different alleged acts of wrongdoing, which infringes the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution;

C. The procedures pursuant to which punitive damages are awarded fail to provide a reasonable limit on the amount of the award against defendants, which thereby violates the due process clause of the Fourteenth Amendment of the United States Constitution;

D. The procedures pursuant to which punitive damages are awarded fail to provide specific standards for the amount of the award of punitive damages, which thereby violates the due process clause of the Fourteenth Amendment of the United States Constitution;

E. The procedures pursuant to which punitive damages are awarded result in the imposition of different penalties for the same or similar acts and, thus, violate the equal protection clause of the Fourteenth Amendment of the United States Constitution;

F. The procedures pursuant to which punitive damages are awarded permit the imposition of punitive damages in excess of the maximum criminal fine for the same or similar conduct, which thereby infringes the due process clause of the Fifth and Fourteenth Amendments and the equal protection clause of the Fourteenth Amendment of the United States Constitution;

G. The procedures pursuant to which punitive damages are awarded violate the dormant visions of the commerce clause of the United States Constitution, Article I, Section 8. Non-resident defendants are assessed punitive damages by Mississippi courts on a disparate and unequal basis in

violation of the commerce clause, and the dormant provisions related thereto, of the United States Constitution.

SEVENTEENTH DEFENSE

Plaintiff's claim of punitive damages violates the due process clause of Article 3, Section 14 of the Constitution of Mississippi on the following grounds:

- A. It is a violation of the due process clause to impose punitive damages, which are penal in nature upon civil defendants upon the Plaintiff satisfying a burden of proof less than the "beyond a reasonable doubt" burden of proof required in criminal cases;
- B. The procedures pursuant to which punitive damages are awarded fail to provide a limit on the amount of the award against these defendants;
- C. The procedures pursuant to which punitive damages are awarded are unconstitutionally vague and not rationally related to legitimate governmental interests;
- D. The procedures pursuant to which punitive damages are awarded fail to provide specific standards for the amount of the award of punitive damages;
- E. The award of the punitive damages in this action constitutes a deprivation of property without due process of law; and
- F. It is a violation of the due process clause to impose punitive damages against the defendant which are penal in nature, yet compels a defendant to disclose potentially incriminating documents and evidence.

EIGHTEENTH DEFENSE

The award of punitive damages to the Plaintiff in this action would constitute a deprivation of property without due process of law required under the Fifth and Fourteenth Amendments of the United States Constitution.

NINETEENTH DEFENSE

The award of punitive damages against the Defendant in this action would violate the prohibition against laws that impair the obligations of contracts in violation of Article One, Section 22 of the Constitution of Mississippi.

TWENTIETH DEFENSE

The award of punitive damages against the Defendant in this action would violate the due process clause of the United States Constitution, in accordance with the decisions of the United States Supreme Court in BMW v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), Cooper Ind. Inc v Leatherman Tool Group, Inc., 532 U.S. 424, 121 Sup. Ct. 1678, 149L.Ed..2D 674 (2001), State Farm Mutual Automobile Insurance Company v. Campbell, 538 US 408, 123 S.Ct. 1513 (2003), on the following grounds:

- A. It is a violation of the Defendant's right to due process to impose punitive damages to deter future misconduct, where less drastic remedies could achieve this goal;
- B. It is a violation of due process to subject the Defendant to punitive damages without providing the Defendant fair notice of the conduct that will subject it to punishment and the severity of the penalty that may be imposed;
- C. It is a violation of due process to punish the Defendant with the intent of changing its lawful conduct in other states; and
- D. It is a violation of the Defendant's right to due process to impose punitive damages which are grossly excessive.

TWENTY-FIRST DEFENSE

The Defendant affirmatively pleads that the Plaintiff has failed to satisfy conditions precedent and/or conditions subsequent to coverage arising out of any and all insurance

agreements in effect between State Farm and the Plaintiff at the time of the Plaintiff's alleged loss and/or claims. Further, the Defendant would show that all parties other than State Farm were not a party to the contract and as such are not proper parties to this cause.

TWENTY-SECOND DEFENSE

The Defendant affirmatively pleads that some of the Plaintiff's claims are either not covered or excluded from coverage under any applicable State Farm policy.

TWENTY-THIRD DEFENSE

Plaintiff's claims seek to impose on this Defendant a rate structure that has not been filed with or approved by the Mississippi Commissioner of Insurance in accordance with Miss.

Code Ann. §93-2-1 *et seq.* and therefore violate Mississippi law.

TWENTY-FOURTH DEFENSE

Plaintiff's claims interfere with the exclusive or primary jurisdiction of the Commissioner of Insurance of Mississippi, including his jurisdiction over forms, rates and penalties.

TWENTY-FIFTH DEFENSE

Plaintiff's claims are barred by the principle of detrimental reliance as the Defendant has detrimentally relied upon prior approval of the rates and policy forms approved by the Commissioner of Insurance of Mississippi and upon acceptance by its policyholders of policies offered in accordance with the approved rates and forms.

Respectfully submitted,

BRYAN, NELSON, SCHROEDER,

CASTIGLIOLA & BANAHAN, PLLC

Attorneys for Defendant

BY: /s/ John A. Banahan

JOHN A. BANAHAN (1731)

MATTHEW E. PERKINS (102353)

CERTIFICATE OF SERVICE

I, **JOHN A. BANAHAH**, one of the attorneys for the Defendant, **STATE FARM FIRE & CASUALTY COMPANY**, do hereby certify that I have this date electronically filed the foregoing Answer to Complaint with the Clerk of Court using the ECF system which sent notification of such filing to the following:

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DATED, this the 26th day of September, 2007.

/s/ John A. Banahan
JOHN A. BANAHAH (1731)
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