

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

[REDACTED] **Plaintiff**
vs. [REDACTED]
LEXINGTON INSURANCE COMPANY **Defendant**

**LEXINGTON INSURANCE COMPANY’S MEMORANDUM IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT**

COMES NOW Defendant, Lexington Insurance Company (“Lexington”) and in support of its Motion for Partial Summary Judgment, shows the Court as follows:

UNDISPUTED FACTS

1. This action concerns Plaintiff’s one story home located at [REDACTED], [REDACTED] which was damaged as a result of Hurricane Katrina.
2. The property was covered by a Lexington HO3 Homeowners policy during Hurricane Katrina. *See* Lexington Declaration Page, **Exhibit A**¹.
3. In addition to the Lexington policy, Plaintiff had a flood insurance policy with Omega Insurance Company (“Omega”) with \$154,000.00 of coverage on the dwelling but no contents coverage. *See* Omega Declaration Page, **Exhibit B**.
4. Plaintiff admits in deposition testimony that flood damage was not covered by her Lexington policy. *See* Deposition of [REDACTED] **Exhibit C** at p. 137.
5. The flood adjuster retained by Omega concluded in his preliminary report that there was seven foot of interior storm surge damage due to “tidal overflow” with “velocity flow” and “wave action” flood characteristics. *See* Omega Preliminary Report Dated September 24, 2005, **Exhibit D**.

¹ Copies of exhibits referenced herein are attached to the motion for summary judgment.

6. On September 28, 2005, Plaintiff signed an Omega advance payment request in which the first sentence stated: “This agreement acknowledges you [Plaintiff] have sustained a Flood loss on the above date at the above address.” *See* Omega Advance Payment Request, **Exhibit E**.

7. The Omega Flood Narrative Report stated the following regarding the cause of loss:

Using my best judgment, it is my opinion that this risk is a policy limit loss. This risk is located in an area of Mississippi severely damaged by the floods caused by Hurricane Katrina. The exterior rear and front exterior walls were severely damaged by the velocity flow/wave action from the storm surge. The building was racked from its foundation elements as indicated in the attached photos and my inspection. The interior walls were also severely damaged by the velocity flow of the flood water. The storm surge/wave action was estimated at a height between 22 to 25 feet in this area. The building was completely racked, as my photos indicate.

See Omega Flood Narrative Report Dated November 4, 2005 and Select Photos, **Exhibit F**².

8. Omega calculated the flood damage to be \$263,562.01, comprising \$154,000 for policy limits with \$109,562.01 in excess damage above flood limit. *See* Omega Flood Damage Estimate, **Exhibit G**.

9. Plaintiff was provided with a copy of a total flood loss estimate by Omega. *See* Omega Building Estimate Dated November 4, 2005, **Exhibit P** at 2nd page of attachment; *see also* **Exhibit C** at pp. 194-195.

10. Plaintiff³ accepted policy limit payments from Omega for the flood damage to her dwelling. *See* Omega Checks to the Plaintiff, **Exhibit H**.

² Not all pages of every report have been attached in an effort to not inundate the Court with paperwork. For example, the Lexington claim file for this matter has over 700 pages with hundreds of photographs.

³ Plaintiff mentioned in her deposition that one lady in her neighborhood who stayed at home during Hurricane Katrina drowned. *See* **Exhibit C**, at p. 117. Plaintiff now contends that she took the money from Omega knowing it was not owed to her and will “surprise” Omega with a reimbursement check from the monies received from

11. The Lexington policy contained specific exclusions for damage caused by flooding and flood/wind:

We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. ...

c. Water Damage, meaning:

(1) Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;

(Insurance Policy, Section 1 – Exclusions, p.8)

Your homeowners or dwelling policy does NOT provide coverage for loss caused by flood or mudslide, which is defined, in part, by the National Flood Insurance Program as: ...overflow of inland or tidal waters or from the unusual and rapid accumulation or runoff of surface waters from any source.

(Insurance Policy, Flood Insurance Notice)

See Excerpts of Lexington Policy, **Exhibit I**.

12. The Lexington policy contained the following conditions in the event of loss:

Section 1 – Conditions

2. **Your Duties after loss.** In case of a loss to covered property, you must see that the following are done: . . .
- e. Prepare an inventory of damaged personal property showing the quantity, description, actual cash value and amount of loss. Attach all bills, receipts and related documents that justify the figures in the inventory.
 - f. As often as we reasonably require:
 - (1) Show the damaged property;
 - (2) Provide us with records and documents we request and permit us to make copies; and
 - (3) Submit to examination under oath, while not in the presence of any other “insured,” and sign the same;
 - g. Send to us, within 60 days after our request, your signed, sworn proof of loss which sets forth, to the best of your knowledge and belief: . . .
 - (3) Other insurance which may cover the loss; . . .
 - (6) The inventory of damaged personal property described in **2.e.** above; . . .

Lexington as soon as Lexington pays her policy limits, “she thinks.” Plaintiff has not paid Omega anything from what Lexington has paid her and has entered into no “agreement” with Omega to pay them in the future. See **Exhibit C**, at pp. 118-123, 158-159.

See **Exhibit I** at Section I – Conditions pp. 9-10.

13. Lexington retained ICA, an independent contractor, to investigate the claim September 8, 2005. ICA concluded the following: “interior had approximately 6 feet storm surge go through it”; “personal property in the dwelling was totally destroyed by the storm surge”; and “insured dwelling is not livable due to the storm surge.” ICA recommended payment for damage to the roof. See ICA Report and Select Photos, **Exhibit J**.

14. Lexington also retained PTC, an independent contractor, to do a cause and origin evaluation of Plaintiff’s home. The PTC engineers concluded that the high water mark in the home was six feet above the finished floor elevation and that “this residence was not damaged by wind with the exception of 200 sf of roof covering that was damaged and 10 sf of soffit that was displaced. The remaining observed damage to the residence was the result of the storm surge from Hurricane Katrina. The structural integrity of the residence has been compromised by the storm surge from Hurricane Katrina.” See PTC Report Dated May 3, 2006 Without Attachment, **Exhibit K**.

15. On June 15, 2006, the Plaintiff responded to the PTC report and documents that were sent to her by Lexington. Plaintiff disputed the finding of six feet of flood water in her home and wrote notes to Lexington arguing (1) that her lot was 22 feet above sea level; (2) her finished floor was elevated three feet above that; (3) that FEMA reports showed storm surge of 19 to 22 feet; and (4) therefore flood water would not have entered her home. See Handwritten Notes of Plaintiff Attached to June 15, 2006 Letter, **Exhibit L**.

16. Plaintiff has since admitted that engineering elevation certificates establish that the finished floor of her home was either 16.2 or 16.4 feet above sea level. See Undated Handwritten Note of Plaintiff, **Exhibit M**; see also **Exhibit C** at pp. 186-187.

17. PTC responded to all of Plaintiff's handwritten comments in her June 15, 2006 letter in a report dated June 27, 2006. *See* PTC Supplemental Report Dated June 27, 2006, **Exhibit N**.

18. Lexington next retained Reid, Jones, McRorie & Williams ("RJMW"), an independent contractor, to adjust the loss. The RJMW adjuster, after inspecting the property and speaking with Plaintiff, stated the following in the INSPECTION section:

...The Insured admitted that she was under-insured on the flood policy. ... There are visible flood-lines at 72" throughout the dwelling, as well as damage from floating flood debris. ... The insured openly admits that floodwaters were 4 feet deep one block to the north of her location, which is 6 feet higher in elevation than her location, based on FEMA maps.

See RJMW Report Dated September 14, 2006 and Select Photos, **Exhibit O**; *see also* **Exhibit C** at p. 117.

19. Lexington retained a second engineering firm, Halliwell Engineering, to do a cause and origin as well as a wind analysis the results of which were that there was a storm surge of 22 feet with six feet of flood water above the finished floor of Plaintiff's home. *See* Excerpts from Halliwell Report Dated March 15, 2007, **Exhibit Q**.

20. RJMW completed another report to Lexington noting in the Personal Property section:

Due to the fact that the flood level inside of the house was approximately six feet the majority of the insured's personal property was damaged due to flooding and not wind damage. The insured has not presented a personal property inventory of damaged items above the flood line and we will have to follow up with her in this regard."

See RJMW Report Dated April 30, 2007, **Exhibit R**. [HU586-588]

21. Plaintiff admitted in deposition that she had “nothing of value” in her attic and that if her home had had six foot of flooding all of her first floor contents would have been damaged by the flood water. *See Exhibit C* at p. 196.

22. Lexington timely paid Plaintiff each recommended payment made by the independent contractors it retained such that Lexington has made the following overall payments under its policy:

	<u>Policy Limits</u>	<u>Lexington Payments</u>
Coverage A (Dwelling):	\$243,000.00	\$61,900.24
Coverage B (Other Structures):	\$15,400.00	\$ 1,050.76
Coverage C (Contents):	\$46,200.00	\$ 0.00
Coverage D (Loss of Use):	\$30,800.00	<u>\$30,800.00</u>
TOTAL		\$93,751.00.

See Lexington Payment Summary, **Exhibit S**.

23. Plaintiff has also taken the position that even if her home was flooded the wind damage occurred first though the damage was all a part of Hurricane Katrina. *See Exhibit C* at pp. 92-93, 105, 110.

24. However, Plaintiff was not at her home during Hurricane Katrina and cannot say from where the floodwaters came. *See Exhibit C* at p. 94.

25. Plaintiff has admitted that the Lexington claims examiner who was in charge of her case, Dennis Erwin, was really being honest with her in asking for an inventory of contents and proof that her house was damaged by wind, not flood. Plaintiff concedes that Mr. Erwin was very professional in dealing with her. *See Exhibit C* at pp. 244, 268-269.

26. As for the Hunter sailboat mentioned in the Complaint, Plaintiff admits that she did not want the boat insured and in fact the application for insurance with Lexington did not

disclose the existence of any sailboat. See **Exhibit C** at pp. 149-150; see also Lexington Application, **Exhibit T** at the 2nd page.

27. On August 28, 2008, Plaintiff filed her Complaint.

28. While not a model of clarity, the Complaint appears to allege two causes of action against Lexington: (i) Breach of Contract and (ii) Bad Faith.⁴

SUMMARY OF THE ARGUMENT

There is no genuine issue as to any material fact and, as a matter of law, Lexington is entitled to summary judgment on Plaintiff's Bad Faith claim. Lexington had a legitimate and arguable reason to deny payments for damage that was caused by flood and/or a combination of flood and wind, perils that are not covered under the express terms of the policy. In addition, Plaintiff concedes that she did not have any coverage for her 25' Hunter sailboat and summary judgment in Lexington's favor is proper as to this claim contained in her Complaint. In addition, there is no material fact at issue regarding Plaintiff's claim for contents coverage and, as a matter of law, summary judgment is proper in Lexington's favor.

SUMMARY JUDGMENT STANDARD

"Summary judgment is proper if, after adequate opportunity for discovery, the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits filed in support of the motion show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Young v. Equifax Credit Services Info. Inc.*, 294 F.3d 631, 635 (5th Cir. 2002). The moving party bears the burden of pointing to an

⁴ While Plaintiff does not allege a cause of action for Fraud, she does state in the Complaint that Lexington is "trying to cheat me." Complaint (Doc. 1) at p. 3. Should the Court determine that a Fraud count is alleged, Plaintiff's allegations are so general and conclusory that they do not satisfy the "particularity" pleading requirements of FED. R. CIV. P. 9(b). In addition, as supported by this memorandum, there is no evidence that Plaintiff relied to her detriment on representations at the time she procured the policy or on any after the claim was made. See generally, *Leonard v. Nationwide Mutual Insurance Co.*, 483 F. Supp. 3d 684 (S.D. Miss 2006), *aff'd*, 499 F. 3d 419 (5th Cir. 2007), *cert. denied*, 2008 WL 77718 (2008).

absence of evidence to support the non-moving party's case, and summary judgment will be upheld on appeal where the non-movant is unable, in turn, to point to any evidence in the record that would sustain a finding in the non-movant's favor on any issue on which he bears the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

The moving party bears the initial burden of showing a basis for its motion and identifying the portions of the record which demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The non-moving party must then indicate "specific facts showing that there is a genuine issue for trial." *Id.* at 325. The plaintiff does not satisfy this burden merely with "some metaphysical doubt as to the material facts, by conclusory allegations, or by only a scintilla of evidence." *Willis v. Roche Biomedical Laboratories, Inc.*, 61 F.3d 313, 315 (5th Cir. 1995). Plaintiffs bear the burden of proof to remove the case from the realm of conjecture. When plaintiffs fail to meet that burden, summary judgment is well taken. *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364 (5th Cir. 1988).

ARGUMENT

I. Summary Judgment is Proper as Plaintiff Cannot Establish Bad Faith

Plaintiff's bad faith claim fails because Lexington paid the claim according to the provisions set forth in the policy and according to the independent opinions submitted by ICA, PTC, RJMW, Halliwell, and the determinations made by Plaintiff's flood carrier. While Plaintiff may disagree with some of the findings, Plaintiff has not and cannot provide reliable evidence to dispute the overwhelming evidence that the majority of the damage was caused by flood, and specifically relevant to the dispositive motion at hand, that Lexington did not have a legitimate and arguable reason to deny the damage caused by flood.

In order to make a claim for a “bad faith” refusal to pay an insurance claim in Mississippi, so as to entitle the Plaintiff to punitive damages, Plaintiff must demonstrate each of the following: (1) the insurer breached the insurance contract – that the claimed amount is actually owed; (2) the insurer had no arguable reason to deny the claim; and (3) the insurer acted with malicious conduct, gross negligence, or with reckless disregard of the rights of others, so as to constitute an independent tort. *See Aetna Casualty & Surety Co. v. Day*, 487 So.2d 830, 832 (Miss. 1986); *see also* Jackson & Miller, 5 MS Prac. Encyclopedia MS Law § 40:77. The requisite finding of bad faith involves a level of culpability above mere negligence and “implies the conscious doing of a wrong because of dishonest purpose or moral obliquity.” *Bailey v. Bailey*, 724 So.2d 335, 338 (Miss. 1998) (quoting Black’s Law Dictionary 139 (6th Ed. 1990)).

Lexington has a right under the insurance policy to deny payments for damage that was caused by (a) flood water (as defined by the policy) or (b) a combination of flood and wind. Like most homeowners’ policies, the Lexington policy contains exclusions for damages caused by flood water including the following language:

We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. ...

c. Water Damage, meaning: Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind.

(Insurance Policy, Section 1 – Exclusions, p.8)

Your homeowners or dwelling policy does NOT provide coverage for loss caused by flood or mudslide, which is defined, in part, by the National Flood Insurance Program as: ...overflow of inland or tidal waters or from the unusual and rapid accumulation or runoff of surface waters from any source.

(Insurance Policy, Flood Insurance Notice) (**Exhibit I**)

The water exclusion and the anti-concurrent clause provisions are valid and enforceable under Mississippi law. *See e.g., Tuepker v. State Farm Fire & Casualty Co.*, 507 F.3d 346 (5th Cir. 2007); *Leonard v. Nationwide Mutual Ins. Co.*, 499 F.3d 419, 428 (5th Cir. 2007). Consequently, the anti-concurrent cause clause bars any claim, or parts of a claim, that Plaintiff may make regarding wind damage that preceded flood damage or for damage caused by flood or a combination of flood and wind. Even if the wind first damaged a portion of the home which portion was thereafter flooded, there is still no coverage under the Lexington policy for the flood damaged portion of the home. In other words, it matters not whether the egg or chicken came first.

As for the underlying issue, Lexington is contractually obligated to pay for damages caused by wind but not by flood. Lexington retained numerous entities to evaluate the claim and to perform a cause and origin analysis to determine what damage was caused by wind and what damage was caused by flood. All of the entities involved, including Plaintiff's flood carrier, concluded that the majority of the damage sustained was caused by flood waters.⁵ The property damage that was found to be caused by a covered event, wind, was paid by Lexington.

In a bad faith count, Plaintiff must also prove that Lexington did not have an arguable basis to deny parts of her claim. Plaintiff cannot support this element because the evidence demonstrates that, as a matter of law, the independent reports and the conclusions contained therein provided Lexington with a reasonable basis to deny Plaintiff's claim for damages caused by flooding, whether preceded by wind damage or not.

In an ordinary bad faith case, "[t]he trial court must determine first, as a matter of law, whether the issue of punitive damages on account of alleged bad faith should be submitted to a

⁵ Plaintiff has not filed an objection to any of Lexington's disclosed experts (Doc. 12).

jury.” *Cossitt v. Federated Guaranty Mutual Insurance Co.*, 541 So.2d 436, 443 (Miss.1989). “[I]f an insurance company has a legitimate or arguable reason for denying a claim, then such will utterly *preclude* the submission of the issue of punitive damages to the jury.” *Pioneer Life Insurance Co. of Illinois v. Moss*, 513 So.2d 927, 930 (Miss.1987) (emphasis added.) *See, e.g., Blue Cross & Blue Shield of Mississippi, Inc. v. Campbell*, 466 So.2d 833, 839-41 (insurer’s reliance on its medical staff’s opinion constituted an arguable basis for denying claim). Additionally, mere “pocketbook disputes,” or disputes over the amount of coverage do not give rise to the independent tort of bad faith. *See, e.g., Cossitt v. Alfa Ins. Co.*, 726 So.2d 132 (Miss. 1998). In the instant case, there was never a refusal to pay or a full denial of coverage. Rather, there is only a “pocketbook” dispute as to the amount owed which, in turn, is based upon the cause of the loss.

This cause of action between Plaintiff and Lexington arises under a contractual relationship, with Lexington owing obligations to Plaintiff, including an implied duty of good faith and fair dealing, and the legal responsibility to fairly evaluate her claims and to respond accordingly. Not only do the numerous reports all reach the same conclusions, the photographs taken during the various inspections all show that the single level dwelling was virtually gutted, while the roof sustained only minimal wind damage. *See, e.g.,* Photographs attached to **Exhibit F, Exhibit J, and Exhibit O**.

The evidence reveals a legitimate reason to deny the Plaintiff’s additional claims over and above what was paid by Lexington. There is no evidence that Lexington was attempting to improperly exclude wind covered damage; instead, the evidence clearly indicates Lexington made several attempts to learn what physical damage was due to a covered event, as well as to determine what physical damage was due to an excluded peril.

In addition and despite Plaintiff's proposal to pay back the "government" flood payments upon receipt of payments from Lexington, this Court has decided in other Hurricane Katrina litigation that acceptance of flood proceeds constitutes a judicial admission of the extent of flood damage. *See Liberty Mut. Ins. Co. v. Lamb*, 2008 WL 625021 at *4 (S.D. Miss 2008). Plaintiff accepted policy limits of \$154,000 from her flood carrier. And the Final Report generated by Omega's flood adjuster determined that the dwelling value, on an Actual Cash Value ("ACV") basis, was \$264,575.66 and that the total loss due to flood was \$264,562.01, leaving \$109,562.01 in excess damage over the \$154,000.00 policy limit. *See* Final Report, **Exhibit G**. Plaintiff is now left with the impossible task of accepting flood payments and the determinations that came with them and now creating some evidence that Lexington improperly denied her claims without a valid reason.

The final element Plaintiff must prove is that Lexington's actions rose to the level of an independent tort. Plaintiff merely alleges that "[d]ifferent adjusters came like a parade – one after another & sometimes two at a time" and that she "began to believe that they were trying to find a reason not to pay me." Complaint (Doc. 1) at p. 1. A bare and conclusory allegation that Lexington was trying to articulate reasons to deny coverage is not supported by the evidence and Plaintiff cannot provide any factual support for her allegations. Lexington repeatedly expended time, effort and money in evaluating any and all claims made by Plaintiff. Her complaint about having to provide Lexington with documents such as an inventory of contents is nothing more than fulfillment of one of the "conditions" of the Lexington policy following a claim of loss and is not an actionable claim. The credible evidence will not support a finding that additional damage is covered under the policy, let alone that Lexington's actions rose to the level of an independent tort.

II. Plaintiff's 25' Hunter Sailboat Was Not Covered Under the Lexington Policy and Summary Judgment is Proper as to this Claim.

Plaintiff's Complaint appears to request relief in the form of payment for her 25' Hunter sailboat.⁶ In deposition testimony, Plaintiff concedes that the Lexington policy did not provide coverage on the boat. *See Exhibit C* at pp. 149-150; *see also* Lexington Application, **Exhibit T**. Therefore, summary judgment is proper as to Plaintiff's claims for damages to her sailboat.

III. Summary Judgment is Proper as to Plaintiff's Coverage C (Contents) Claims as There is No Material Fact at Issue.

The Lexington policy provided \$46,200 in contents coverage. Plaintiff did not have content coverage under her flood policy with Omega. Plaintiff admitted in deposition that she had "nothing of value" in her attic and that if her home had had six foot of flooding all of her first floor contents would have been damaged by the flood water. *See Exhibit C* at p. 196. Plaintiff also concedes that the FEMA reports showed storm surge of 19 to 22 feet; however, Plaintiff has since admitted that engineering elevations certificates establish that the finished floor of her home was either 16.2 or 16.4 feet above sea level. *See Handwritten Notes of the Plaintiff, Exhibit L; See also Undated Handwritten Note of Plaintiff, Exhibit M; see also Exhibit C* at pp. 186-187. Thus, this evidence presented by Plaintiff to Lexington establishes that there was any where from 3 to 6 feet of flood water in her home. Therefore, no genuine issue as to any material fact exists that, at minimum, Plaintiff's residence was subjected to substantial interior flooding and that all contents would have been destroyed by the flood waters.

WHEREFORE, PREMISES CONSIDERED, Lexington Insurance Company moves this Court to enter partial summary judgment in its favor as to Plaintiff's Bad Faith cause of action and claims for extra-contractual damages, Plaintiff's claim for coverage of the 25' Hunter

⁶ The Complaint simply states: "They have not paid me nothing for my 25' Hunter sailboat." (Doc. 1 at p. 3).

sailboat, and Plaintiff's claims for Coverage C (Contents) under the Lexington policy such that the only remaining claim would be for Breach of Contract as it relates to dwelling and perhaps other structures coverage under the Lexington policy.

[/s/ L. Hunter Compton, Jr.](#)

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CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2009, the foregoing document was electronically filed with the Clerk of this Court using the CM/ECF system and a copy sent via U.S. Mail, first class postage prepaid to:



[/s/ L. Hunter Compton, Jr.](#)

COUNSEL