TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the Circuit Court of Greene County, State of Missouri entered on March 22, 2005 by the Honorable J. Miles Sweeney. Appellants, Albert J. Stone and Tammy Stone, in their capacity as Assignees of Arlene M. Bateman ("Bateman") instituted suit on various claims assigned to them by Bateman arising out of a contract for automobile liability insurance issued by Farm Bureau Town & Country Insurance Co. of Missouri ("Farm Bureau"). The Circuit Court, by its judgment, sustained a motion for partial summary judgment of Appellants, for breach of contract, and assessed actual damages. The Circuit Court, by its judgment, sustained Farm Bureau's motion for summary judgment on all other claims asserted by Appellants, the same being claims for breach of fiduciary duty, bad faith and for assessment of exemplary damages.

Farm Bureau perfected an appeal from the judgment by filing its notice of appeal on the 29th day of April, 2005 with the office of the Circuit Clerk of Greene County, Missouri. A cross-appeal was perfected by Plaintiffs/Appellants Albert Stone and Tammy Stone by virtue of their filing of a Notice of Appeal with the office of the Circuit Clerk of Greene County, Missouri on May 4, 2005, as authorized by Rule 81.04(b). Thereafter, the Missouri Court of Appeals, Southern District, issued its order consolidating the appeal of Farm Bureau with the subsequent cross-appeal of Albert J. Stone and Tammy Stone and directed that further proceedings before the court would be conducted with plaintiffs in the Circuit Court, Albert J. Stone and Tammy Stone, denominated as Appellants and Farm Bureau to be treated as Respondent.

The appeals to the Missouri Court of Appeals in this matter were proper pursuant to Article V Section 3 of the Missouri Constitution in that the case, and the claims and defenses of the parties, do not involve any claim or defense which is within the exclusive appellant jurisdiction of the Missouri Supreme Court. Appeal to the Southern District of the Missouri Court of Appeals was proper pursuant to Section 477.060 RSMo. as the Circuit Court of Greene County, in which the judgment was rendered, is within the territorial boundaries of the Southern District of the Missouri Court of Appeals.

The Missouri Court of Appeals, Southern District, issued a written opinion on the 30th of December, 2005. A motion for rehearing and alternative application for transfer was filed with the Court of Appeals by the Stones on the 6th of January, 2006. An application for transfer was filed by the Stones with the Missouri Supreme Court on January 20, 2006. The Missouri Supreme Court issued its order sustaining the application for transfer on the 28th of February 2006. Jurisdiction of this case is now properly before the Missouri Supreme Court pursuant to its Order of February 28, 2006, as authorized by Article 5, § 10 of the Missouri Constitution and Rule 83.04.

STATEMENT OF FACTS

On the 2nd day of August, 2002, Farm Bureau renewed an automobile liability insurance policy for Arlene M. Bateman ("Bateman") and Gary Bateman, providing liability insurance coverage for a 1995 GMC Jimmy, policy number APV027097701. The policy issued provided for six months of coverage from the effective date of August 2, 2002 through an expiration date of February 2, 2003. (L.F. 25) The policy provided for bodily injury liability coverage limits of $250,000.00. (L.F. 201)

The liability insurance policy issued by Farm Bureau contained contract provisions providing for cancellation for nonpayment of premium by mailing to the named insured at the last known address, at least ten days notice. (L.F. 217)

Farm Bureau claimed that it mailed a notice of cancellation to Bateman on October 10, 2002 providing for a cancellation date effective the previous day, i.e. October 9, 2002. (L.F. 41 and 29)

On December 23, 2002 Bateman was involved in a motor vehicle accident when she allowed her 1995 GMC Jimmy to cross the center line of State Highway 5 in the State of Missouri and come in to contact and collide with an automobile operated by Albert J. Stone and occupied by his wife, Zella Nadine Stone. (L.F. 9 and 32-35)

The Farm Bureau policy of insurance issued to Bateman obligated Farm Bureau to defend any suit brought against Bateman for any action or occurrence during the course of the effective policy period. (L.F. 204, 202-241) The policy also reserved unto Farm Bureau the right to control the defense and settlement of any suit brought against Bateman. (L.F.

204) The policy prohibited Bateman from voluntarily making any payment, assuming any obligation or incurring any expense, except at her own cost, and except for immediate medical or surgical relief to others at the time of the accident. (L.F. 215)

Albert J. Stone suffered severe personal bodily injuries as a result of the automobile accident on December 23, 2002. Mr. Stone's wife, Zella Nadine Stone, was pronounced dead at the scene of the accident. (L.F. 32-35)

On July 10, 2003, suit was instituted in the Circuit Court of Greene County by Albert J. Stone, against Bateman for personal injuries sustained by him as a result of the automobile accident of December 23, 2002. Also on July 10, 2003, separate suit was instituted in the Circuit Court of Greene County by Tammy Stone, surviving daughter of Zella Nadine Stone, and Albert J. Stone, against Bateman for the wrongful death of Zella Nadine Stone. (L.F. 10 ¶'s 10&11) Bateman was served with summons in each of the suits instituted against her on the 27th day of July, 2003. (L.F.10 ¶ 12) Notice of each of the two suits was provided to Farm Bureau by letter dated August 18, 2003, received by Farm Bureau, August 22, 2003. (L.F. 10 ¶ 13 and 26), (L.F. 75 ¶s 4 and 5) The letter of August 18, 2003 directed to Farm Bureau (L.F.26), in addition to providing notice the of pending lawsuits against Bateman, also advised service of process had been obtained upon Bateman and included a demand upon Farm Bureau for settlement of both suits for the total sum of $900,000.00 or the total amount of liability insurance coverage available to Bateman, whichever was less. (L.F.26-27)

Additional demand was made upon Farm Bureau by the attorney for Bateman, Eric Hutson, of Lebanon, Missouri, by letter dated September 15, 2003. (L.F. 28) In response to

Mr. Hutson's demand letter, Farm Bureau submitted its letter dated September 19, 2003 asserting that Mr. Hutson's letter of September 15, 2003 was the first notice that Farm Bureau had received of the pending lawsuits. (L.F. 30-31) Farm Bureau did not inform Eric Hutson, Bateman's attorney, that it had previously received the notice and demand letter regarding the two suits from counsel for Albert J. Stone and Tammy Stone on August 22, 2003. (L.F. 30-31)

Farm Bureau did not provide defense of Bateman in either of the two suits filed against her. Farm Bureau did not endeavor to effect settlement of the claims asserted in either of the two suits. (L.F. 61 ¶'s 6 & 7) and (L.F. 75 ¶'s 6 & 7)

On December 29, 2003 Bateman entered in to an agreement with Albert J. Stone and Tammy Stone pursuant to § 537.065 RSMo. which provided, in part, that in the event a judgment or judgments were obtained in either of the two suits pending against her that she would then execute an appropriate assignment or assignment of proceeds of chose in action, in order to allow and facilitate collection activities on claims which Bateman may then have available to her against Farm Bureau or its corporate affiliates. (L.F. 186-188) On January 6, 2004 the lawsuit of Albert J. Stone against Bateman, seeking damages attributable to his personal bodily injuries as a result of the automobile accident on December 23, 2002, was tried before the court. The court entered a judgment in favor of Albert J. Stone, finding negligence on the part of Bateman, damages attributable to medical expense exceeding the sum of $125,000.00, pain and suffering and providing for total damages in the sum of $538,000.00 which the trial court determined to be fair and reasonable under the circumstances. (L.F. 34-35) Also on the 6th day of January, 2004 trial before the court was conducted on the wrongful death claim instituted against Bateman by Tammy Stone and Albert J. Stone. The court found Bateman liable for the death of Zella Nadine Stone and awarded damages to the plaintiffs in the amount of $368,000.00. (L.F. 32-33)

Following entry of the judgments against Bateman, she executed an assignment (L.F. 36-39), wherein she assigned all claims which she may then have had against Farm Bureau to Albert J. Stone and Tammy Stone, whether the same sounded in contract, or in tort, and whether for breach of fiduciary duty, breach of contract, or bad faith, including right to recover exemplary or punitive damages. The assignment further provided that in the event it was deemed to be invalid it would be treated as an assignment of proceeds of chose in action. The assignment further provided that it was not a release of liability and would not in any way constitute a release or satisfaction of judgments previously obtained by Albert J. Stone or Tammy Stone against Bateman. (L.F. 36-39)

On the 30th day of March, 2004 Albert J. Stone and Tammy Stone, in their capacity as assignees of Bateman, instituted suit against Farm Bureau in the Circuit Court of Greene County, State of Missouri (L.F.1 and L.F. 8-39). The suit instituted against Farm Bureau asserted claims for relief in six separate counts as follows:

Count I - Breach of Contract;

Count II - Breach of Fiduciary Duty to Defend;

Count III - Breach of Fiduciary Duty to Settle;

Count IV - Bad faith in Failure to Defend;

Count V - Bad faith in Failure and Refusal to Settle;

Count VI - Claim for Exemplary Damages (L.F. 8-39)

On the 31st day of August, 2004 Farm Bureau answered the Amended Petition then pending before the Circuit Court (L.F. 3 and L.F. 40-57). Within Farm Bureau's answer, it admitted that it had issued an automobile liability policy providing for liability insurance for Bateman for the period of time from August 2, 2002 through February 2, 2003. (L.F. 8-9 ¶'s 4 & 5) and (L.F. 40 ¶'s 4 & 5)

Farm Bureau admitted that it had sent a cancellation notice dated October 10, 2002 purporting to cancel the liability insurance for Bateman on October 9, 2002 for reason of nonpayment of premium. (L.F. 11 ¶ 19) and (L.F. 40 ¶ 5) and (L.F. 42 ¶ 19) Farm Bureau admitted that it had received a demand letter for settlement of the claims for the wrongful death of Zella Nadine Stone and for the personal injuries sustained by Albert J. Stone on the 22nd day of August, 2003. The demand letter was attached to the Amended Petition marked as Exhibit "B", dated August 18, 2003. (L.F. 10) and (L.F. 42 ¶ 14)

Farm Bureau admitted receiving the second demand letter from attorney Eric Hutson dated September 15, 2003. (L.F. 11 ¶'s 16 & 17); (L.F. 30); (L.F. 61 ¶ 5) and (L.F. 75 ¶ 5) Farm Bureau admitted that it did not provide defense of either of the two suits filed against Bateman and that it did not settle either of the two suits on her behalf. (L.F. 61 ¶'s 6 & 7) (L.F. 75 ¶'s 6 & 7) Farm Bureau admitted the policy provisions for cancellation due to nonpayment of premium were such that ten days notice was required if the policy was being canceled for nonpayment of premium. (L.F. 61 ¶ 8); (L.F. 75 ¶ 8) and (L.F. 76)

On September 24, 2004 Tammy Stone and Albert J. Stone filed their Motion For Partial Summary Judgment (L.F. 58) wherein they sought a legal determination by the court that (1) The Farm Bureau liability policy was in effect on the date of the automobile accident, December 23, 2002, due to the fact that Farm Bureau's cancellation notice was ineffective; (2) that its failure and refusal to defend and settle the two suits instituted against Bateman constituted, at a minimum, a breach of contract; (3) that the damages flowing from that breach was in an amount equal to the sum of the two judgments obtained against Bateman, the same being a total of $906,000.00, with interest from January 6, 2004. (L.F. 58-73) The motion of the Stone's for partial summary judgment on the breach of contract claim totaled six pages. (L.F. 58-63)

On the 6th of January, 2005, Farm Bureau submitted its memorandum in opposition to plaintiff's Motion For Partial Summary Judgment which, with exhibits attached, totaled 180 pages. (L.F. 74-254) On the 11th day of January, 2005, Farm Bureau filed its Motion For Summary Judgment Or In The Alternative For Partial Summary Judgment. (L.F. 6) and (L.F. 271) Farm Bureau's Motion For Summary Judgment Or In The Alternative For Partial Summary Judgment encompassed a total of 192 pages. (L.F. 271- 463)

On the 18th day of January, 2005, plaintiffs filed their objection and response to the motion of Farm Bureau for summary judgment or in the alternative for partial summary judgment, (L.F. 6 and 484-489) their memorandum in opposition to Farm Bureau's motion for summary judgment (L.F. 490-494) and plaintiffs reply to Farm Bureau's asserted additional material facts. (L.F. 478-483)

Hearing was conducted by the court on the pending motions for summary judgment on January 20, 2005. (L.F. 495) The court entered its judgment on March 22, 2005, sustaining the Motion For Partial Summary Judgment of Albert J. Stone and Tammy Stone on Count I of their Amended Petition, asserting a claim for breach of contract, finding coverage in effect on the date of the accident, and assessing damages in the amount equal to the two judgments rendered against Bateman, totaling the sum of $906,000.00, together with interest which had accrued and was accruing for a total damage award of $1,004,295.00. (L.F. 495-497) The court determined, by its judgment, to grant summary judgment in favor of Farm Bureau on Counts II, III, IV, V and VI of plaintiffs' Amended Petition. (L.F. 495-497)

Appeal from the judgment was instituted timely by Farm Bureau by the filing of its Notice Of Appeal on April 29, 2005. (L.F. 7 and 498-510) A Notice Of Appeal was filed thereafter, May 4, 2005, by Albert J. Stone and Tammy Stone within the time limits prescribed by Rule 81.04(b). (L.F. 7 and 513-522) The Missouri Court of Appeals, Southern District, issued its opinion on December 30, 2005. The Missouri Supreme Court issued its order granting the Stones' application for transfer on the 28th of February, 2006.

POINTS RELIED ON

I.

THE TRIAL COURT ERRED IN GRANTING THE MOTION OF FARM BUREAU FOR SUMMARY JUDGMENT ON COUNTS II - BREACH OF FIDUCIARY DUTY TO DEFEND, AND COUNT III - BREACH OF FIDUCIARY DUTY TO SETTLE, <u>BECAUSE</u> THERE WERE NOT UNCONTROVERTED ISSUES OF MATERIAL FACT BEFORE THE COURT OR A LACK OF GENUINE DISPUTE AS TO THE MATERIAL FACTS RELATIVE TO THE BREACH OF FIDUCIARY DUTY CLAIMS WHICH ENTITLED FARM BUREAU TO JUDGMENT AS A MATTER OF LAW ON COUNTS II AND III, <u>IN THAT</u>: THE FACTS WHICH WERE PRESENTED AND UNCONTROVERTED BEFORE THE COURT (L.F. 58-72 AND 74-76) ESTABLISHED THAT FARM BUREAU HAD NOT EFFECTIVELY CANCELED THE POLICY OF INSURANCE ISSUED TO BATEMAN FOR THE SIX MONTH POLICY PERIOD FROM AUGUST 2, 2002 THROUGH FEBRUARY 2, 2003 (L.F. 25) BECAUSE THE POLICY REQUIRED THE MAILING OF A NOTICE OF CANCELLATION FOR NON-PAYMENT OF PREMIUM AT LEAST TEN DAYS PRIOR TO THE CANCELLATION DATE (L.F. 63) AND FARM BUREAU'S NOTICE OF CANCELLATION WAS MAILED ON OCTOBER 10, 2002 WITH A CANCELLATION DATE OF OCTOBER 9, 2002, (L.F. 29 AND 42 ¶ 18) THEREBY PURPORTING TO EFFECT A CANCELLATION OF THE POLICY ONE DAY PRIOR TO THE MAILING OF THE NOTICE WHICH

WAS NOT IN STRICT COMPLIANCE WITH THE POLICY TERMS. (L.F. 58-73) THE CANCELLATION NOTICE WAS THEREFORE WHOLLY INEFFECTUAL. THE ACCIDENT OF DECEMBER 23, 2002 OCCURRED WITHIN THE POLICY PERIOD OF AUGUST 2, 2002 THROUGH FEBRUARY 2, 2003. (L.F. 9, 25) THE TRIAL COURT CORRECTLY DETERMINED THAT THE CANCELLATION NOTICE WAS INEFFECTIVE AND THAT COVERAGE UNDER THE POLICY WAS INDEED IN EFFECT ON THE DATE OF THE ACCIDENT ON DECEMBER 23, 2002, AND, AS SUCH, THE FAILURE OF FARM BUREAU TO DEFEND BATEMAN OR SETTLE THE CLAIMS AND SUITS AGAINST BATEMAN WITHIN THE POLICY LIMITS CONSTITUTED, AT A MINIMUM, A BREACH OF THE INSURANCE CONTRACT BY FARM BUREAU. (L.F. 495-497) THE TRIAL COURT APPROPRIATELY ASSESSED ACTUAL DAMAGES RESULTING FROM ITS BREACH OF CONTRACT AS SOUGHT BY PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT. (L.F. 495-497) HOWEVER, THE DUTY OF FARM BUREAU TO DEFEND BATEMAN AND THE DUTY OF FARM BUREAU TO SETTLE WITHIN POLICY LIMITS ARE, AS A MATTER OF LAW, FIDUCIARY DUTIES BY REASON OF THE POLICY LANGUAGE WHICH RESERVED UNTO FARM BUREAU THE EXCLUSIVE RIGHT TO SETTLE AND DEFEND ANY COVERED CLAIMS AS IT DEEMED APPROPRIATE. (L.F. 63) [<u>DUNCAN v. ANDREW COUNTY MUTUAL INSURANCE</u>, 665 S.W.2d 13 (MO.APP. W.D. 1983)] THE POLICY FURTHER PROHIBITED ITS INSURED, BATEMAN,

EXCEPT AT HER OWN COST, FROM ASSUMING ANY OBLIGATION, MAKING ANY PAYMENT, OR INCURRING ANY EXPENSE OTHER THAN THOSE WHICH MIGHT HAVE BEEN ATTRIBUTABLE TO IMMEDIATE MEDICAL OR SURGICAL RELIEF REQUIRED BY OTHERS AT THE TIME OF THE ACCIDENT, (L.F. 215) THEREBY CREATING A FORFEITURE PROVISION IN THE EVENT BATEMAN DID NOT ALLOW FARM BUREAU THE OPPORTUNITY TO CONTROL THE DEFENSE AND SETTLEMENT AND THEREBY PROTECT HER. THE DUTY OF FARM BUREAU TO <u>DEFEND</u> WAS A FIDUCIARY DUTY, IN ADDITION TO BEING A GENERAL CONTRACTUAL DUTY OR OBLIGATION. THE DUTY OF FARM BUREAU TO <u>SETTLE</u> WAS A FIDUCIARY DUTY, IN ADDITION TO BEING A GENERAL CONTRACTUAL DUTY OR OBLIGATION. THE BREACH OF A FIDUCIARY OBLIGATION AND PROOF OF THE SAME ENTITLES A PARTY ESTABLISHING SUCH A BREACH UNDER CIRCUMSTANCES WHERE WANTON AND RECKLESS DISREGARD OF THE RIGHTS OF OTHERS IS SHOWN, TO SUBMIT TO THE TRIER OF FACT A CLAIM FOR EXEMPLARY OR PUNITIVE DAMAGES WHICH THE COURT ERRONEOUSLY DENIED IN CONJUNCTION WITH THE GRANT OF SUMMARY JUDGMENT ON THE PLAINTIFFS' CLAIMS FOR BREACH OF FIDUCIARY DUTIES AS SET FORTH WITHIN COUNTS II AND III.

Duncan v. Andrew County Mutual Ins. Co., 665 S.W.2d 13 (Mo.App W.D. 1983)

Freeman v. Leader National Insurance Co., 58 S.W.3d 590 (Mo.App. E.D. 2001)

Grewell v. State Farm Murual Auto Insurance Co., 102 S.W.3d 33 (Mo. 2003)

Klemme v. Best, 941 S.W.2d 493 (Mo. 1997)

II.

THE TRIAL COURT ERRED IN GRANTING THE MOTION OF FARM BUREAU FOR SUMMARY JUDGMENT ON COUNT IV - BAD FAITH IN FAILING TO DEFEND, AND, COUNT V - BAD FAITH IN FAILING TO SETTLE BECAUSE THERE WAS NOT UNCONTROVERTED ISSUES OF MATERIAL FACT BEFORE THE COURT OR A LACK OF GENUINE DISPUTE AS TO THE MATERIAL FACTS WHICH ENTITLED FARM BUREAU TO JUDGMENT ON COUNTS IV AND V, INCLUSIVE, AS A MATTER OF LAW, IN THAT: THE FACTS WHICH WERE PRESENTED AND UNCONTROVERTED BEFORE THE COURT (L.F. 58-72 AND 74-76) ESTABLISHED THAT FARM BUREAU HAD NOT EFFECTIVELY CANCELED THE POLICY OF INSURANCE ISSUED TO BATEMAN FOR THE SIX MONTH POLICY PERIOD DATED FROM AUGUST 2, 2002 THROUGH FEBRUARY 2, 2003 (L.F. 25) BECAUSE THE POLICY REQUIRED THE MAILING OF A TEN DAY NOTICE OF CANCELLATION FOR NON-PAYMENT OF PREMIUM. (L.F. 63) FARM BUREAU'S CANCELLATION NOTICE WAS MAILED ON OCTOBER 10, 2002, PURPORTING TO SET FORTH A CANCELLATION DATE EFFECTIVE OCTOBER 9, 2002, (L.F. 29 and 42 ¶ 18) THEREBY PURPORTING TO EFFECT A CANCELLATION OF THE POLICY ONE DAY PRIOR TO THE MAILING OF THE NOTICE WHICH WAS NOT IN STRICT COMPLIANCE WITH THE POLICY TERMS . (L.F. 58-73) THE CANCELLATION NOTICE WAS THEREFORE WHOLLY INEFFECTUAL. THE ACCIDENT OF

DECEMBER 23, 2002 OCCURRED WITHIN THE POLICY PERIOD OF AUGUST 2, 2002 THROUGH FEBRUARY 2, 2003. (L.F. 495-497) THE TRIAL COURT CORRECTLY DETERMINED THAT THE CANCELLATION NOTICE WAS INEFFECTIVE AND THAT COVERAGE UNDER THE POLICY WAS IN EFFECT ON THE DATE OF THE ACCIDENT, DECEMBER 23, 2002, AND, AS SUCH, THE FAILURE OF FARM BUREAU TO DEFEND BATEMAN OR SETTLE THE CLAIMS AND SUITS AGAINST BATEMAN WITHIN THE POLICY LIMITS CONSTITUTED A BREACH OF THE INSURANCE CONTRACT BY FARM BUREAU. THE LAW ON CANCELLATION OF AN INSURANCE POLICY FOR NON-PAYMENT OF PREMIUM, REQUIRING STRICT COMPLIANCE WITH THE POLICY PROVISIONS IN ORDER TO EFFECT A CANCELLATION FOR NON-PAYMENT OF PREMIUM, HAD NOT CHANGED IN MISSOURI FOR OVER FORTY YEARS. [MFA MUTUAL INS. CO. v. SOUTHWEST BAPTIST COLLEGE, INC., 381 S.W.2d 797 (MO. 1964)]; [CAIN v. ROBINSON LUMBER CO., 295 S.W.2d 388 (MO. 1956)] FARM BUREAU WAS CHARGED WITH KNOWLEDGE OF THE LAW IN THE STATE OF MISSOURI ON CANCELLATION FOR NON-PAYMENT OF PREMIUM, [BOWLES v. ALL COUNTIES INV. CORP. 46 S.W.3d 636 (MO.APP. S.D. 2001)] AND FARM BUREAU'S REFUSAL TO DEFEND BATEMAN (COUNT IV) AND REFUSAL TO SETTLE THE CLAIMS AND SUITS AGAINST BATEMAN (COUNT V) COULD HAVE BEEN DETERMINED BY A FACT FINDER TO AMOUNT TO BAD FAITH IN EACH INSTANCE, UNDER THE

CIRCUMSTANCES, WHICH INDICATED THAT THE CONDUCT OF FARM BUREAU MAY HAVE AMOUNTED TO A DISHONEST DISREGARD OF ITS DUTY TO PROTECT BATEMAN BY (1) REFUSING TO PROVIDE DEFENSE OF THE SUITS INSTITUTED AGAINST HER AND/OR (2) SETTLING THE SUITS AGAINST HER FOR THE POLICY LIMITS AFTER WRITTEN DEMAND FOR SUCH SETTLEMENT HAD BEEN PROVIDED ON TWO OCCASIONS. (L.F. 26-28) FARM BUREAU HAD BEEN GIVEN AMPLE OPPORTUNITY TO DEFEND AND SETTLE, INSTEAD, FARM BUREAU RELIED UPON ITS WHOLLY INEFFECTIVE CANCELLATION NOTICE AS AN EXCUSE NOT TO UNDERTAKE AND DISCHARGE ITS CONTRACTUAL OBLIGATIONS, WHICH RELIANCE WAS NOT IN GOOD FAITH AND COULD HAVE BEEN INTERPRETED AS, IN FACT, DISHONEST CONDUCT BY FARM BUREAU IN FAILING AND REFUSING TO LOOK OUT FOR THE INTERESTS OF BATEMAN, TO THE EXCLUSION OF ITS OWN FINANCIAL INTERESTS, AND THEREBY PROTECT HER IN DEFENDING AND EFFECTING SETTLEMENT OF THE SUITS AGAINST HER.

Zumwalt v. Utilities Ins. Co., 228 S.W.2d 750 (Mo. 1950)

Landie v. Century Indemnity Co., 390 S.W.2d 558 (Mo.App. W.D. 1965)

Gannaway v. Shelter Mutual Insurance Company, 795 S.W.2d 554 (Mo.App. S.D. 1990)

MFA Mutual Ins. Co. v. Southwest Baptist College, Inc., 381 S.W.2d 797 (Mo. 1964

III.

THE TRIAL COURT ERRED IN GRANTING THE MOTION OF FARM BUREAU FOR SUMMARY JUDGMENT ON THE PLAINTIFFS' CLAIM FOR ASSESSMENT OF EXEMPLARY OR PUNITIVE DAMAGES IN ADDITION TO ALL ACTUAL DAMAGES SUSTAINED (COUNT VI) <u>BECAUSE</u> THERE WAS NOT UNCONTROVERTED ISSUES OF MATERIAL FACT BEFORE THE COURT OR A LACK OF GENUINE DISPUTE AS TO THE MATERIAL FACTS BEFORE THE COURT WHICH ENTITLED FARM BUREAU TO SUMMARY JUDGMENT ON THE TORT THEORIES ASSERTED IN COUNTS II, III, IV, OR V, INCLUSIVE, AS A MATTER OF LAW. RECOVERY BY THE PLAINTIFFS ON ANY OF THE TORT THEORIES WOULD HAVE ENTITLED PLAINTIFFS TO SUBMIT TO THE TRIAL COURT AND A FINDER OF FACT (JURY) THE DETERMINATION AS TO WHETHER THE CONDUCT OF FARM BUREAU UNDER ALL OF THE CIRCUMSTANCES WERE SUCH THAT EXEMPLARY OR PUNITIVE DAMAGES SHOULD BE ASSESSED, IN ADDITION TO ALL ACTUAL DAMAGES SUSTAINED, <u>IN THAT</u>: BREACH OF A FIDUCIARY DUTY IS RECOGNIZED AS A TORT IN MISSOURI, [<u>SCHIMMER v. H.W. FREEMAN CONST. CO.</u>, 607 S.W.2d 767 (MO.APP. E.D. 1980)] ENTITLING A PARTY TO SUBMIT TO THE TRIAL COURT AND A FACT FINDER FOR DETERMINATION AS TO WHETHER THE PARTY WHICH HAS BREACHED A FIDUCIARY DUTY SHOULD BE REQUIRED TO PAY EXEMPLARY OR PUNITIVE DAMAGES, IN ADDITION TO ACTUAL

DAMAGES SUSTAINED. BAD FAITH ON THE PART OF AN INSURANCE COMPANY IS RECOGNIZED AS A TORT IN THE STATE OF MISSOURI [<u>ZUMWALT v. UTILITIES INS. CO.</u>, 228 S.W.2d 750 (MO. 1950)] THEREBY ENTITLING A PARTY THAT ESTABLISHES ACTUAL DAMAGES ATTRIBUTABLE TO BAD FAITH TO SUBMIT TO THE TRIAL COURT AND A FACT FINDER FOR DETERMINATION THE QUESTION AS TO WHETHER AN INSURANCE COMPANY WHICH HAS COMMITTED BAD FAITH SHOULD BE REQUIRED TO PAY EXEMPLARY OR PUNITIVE DAMAGES IN ADDITION TO ACTUAL DAMAGES SUSTAINED. THE DETERMINATION OF WHAT AMOUNT, IF ANY, EXEMPLARY OR PUNITIVE DAMAGES MAY BE ASSESSED IS A FACT QUESTION WHICH IS SUBJECT TO DETERMINATION BY A FINDER OF FACT OR JURY AND IS NOT A QUESTION FOR A COURT TO DISPOSE OF ON A SUMMARY JUDGMENT MOTION.

<u>Cain v. Robinson Lumber Co.</u>, 295 S.W.2d 388 (Mo. 1956)

<u>Bowles v. All Counties Inv. Corp.</u>, 46 S.W.3d 636 (Mo.App. S.D. 2001)

<u>Haynam v. Laclede Elec. Co-op.</u>, 889 S.W.2d 148 (Mo.App. S.D. 1994)

<u>Stojkovic v. Weller</u>, 802 S.W.2d 152 (Mo. 1991)

IV.

THE TRIAL COURT ERRED IN GRANTING THE MOTION OF FARM BUREAU FOR SUMMARY JUDGMENT ON THE PLAINTIFFS' CLAIMS SET FORTH WITHIN COUNT II - BREACH OF FIDUCIARY DUTY TO DEFEND, COUNT III - BREACH OF FIDUCIARY DUTY TO SETTLE, COUNT IV - BAD FAITH IN FAILURE TO DEFEND, COUNT V - BAD FAITH IN FAILURE TO SETTLE, AND COUNT VI - CLAIM FOR EXEMPLARY OR PUNITIVE DAMAGES <u>BECAUSE</u> THE GRANTING OF THE PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT I, BREACH OF CONTRACT, AND ASSESSMENT OF ACTUAL DAMAGES, DID NOT ENTITLE THE TRIAL COURT, OR PRECLUDE THE PLAINTIFFS, AS A MATTER OF LAW, FROM PROCEEDING THROUGH TRIAL FOR DETERMINATION AND RESOLUTION BY A FACT FINDER OF THE SEPARATE TORT CLAIMS ASSERTED IN COUNTS II THRU V MERELY BECAUSE, AS THE COURT NOTED IN PARAGRAPH 5 OF ITS JUDGMENT, (L.F. 496) PLAINTIFFS WOULD BE OBTAINING FULL RECOVERY OF ACTUAL DAMAGES BY THE GRANT OF JUDGMENT BY THE TRIAL COURT ON COUNT I (BREACH OF CONTRACT) AND ASSESSMENT OF ALL ACTUAL DAMAGES SUSTAINED. EVEN THOUGH THE ACTUAL DAMAGES FOR THE CONDUCT AND THEORY OF RECOVERY ASSERTED IN COUNTS II THRU V WOULD, IF DETERMINED FAVORABLY TO THE PLAINTIFFS AT THE TIME OF TRIAL, INVOLVE ASSESSMENT OF THE

SAME ACTUAL DAMAGE AMOUNTS. RECOVERY UNDER COUNTS II THRU V, OR ANY OF THEM, WOULD HAVE ENTITLED PLAINTIFFS TO SUBMIT THEIR CLAIM FOR ASSESSMENT OF EXEMPLARY OR PUNITIVE DAMAGES TO A JURY <u>IN THAT</u> PLAINTIFFS WERE ENTITLED TO ASSERT MULTIPLE THEORIES OF RECOVERY, WHICH WERE NOT INCONSISTENT, WHETHER SOUNDING IN CONTRACT, OR IN TORT, AND WERE NOT REQUIRED TO MAKE ELECTION OF A THEORY OF RECOVERY ON CLAIMS OR THEORIES WHICH WERE NOT INCONSISTENT WITH THE BREACH OF CONTRACT CLAIM, UPON WHICH THE COURT DID GRANT JUDGMENT IN FAVOR OF PLAINTIFFS, BY REASON OF THE POSSIBLE ADDITIONAL DAMAGES IN THE FORM OF AN EXEMPLARY DAMAGE AWARD. THE FACT THAT THE ACTUAL DAMAGES UNDER THE DIVERSE THEORIES OF RECOVERY ASSERTED BY THE PLAINTIFFS IN COUNTS II THRU V INVOLVED PROOF AND ASSESSMENT OF THE SAME AMOUNT OF ACTUAL DAMAGES SUSTAINED DID NOT PRECLUDE PLAINTIFFS FROM PROCEEDING ON THEIR DIVERSE CLAIMS, THOSE SOUNDING IN TORT, AND PLAINTIFFS WERE ENTITLED TO SUBMIT TO A FACT FINDER THEIR THEORIES OF RECOVERY AND OBTAIN A JUDGMENT THEREON. IF PLAINTIFFS HAD EFFECTED RECOVERY ON ONE OR MORE OF THE TORT CLAIMS ASSERTED, OR ANY OF THEM, PLAINTIFFS WOULD, IN ADDITION TO ASSESSMENT OF THE ACTUAL DAMAGES, HAVE BEEN ENTITLED TO HAVE

A TRIAL COURT AND FACT FINDER DETERMINE PLAINTIFFS' CLAIM FOR EXEMPLARY OR PUNITIVE DAMAGES IN ADDITION TO ALL ACTUAL DAMAGES SUSTAINED. THEORIES OF RECOVERY WHICH WOULD BE DUPLICATIVE AS TO ACTUAL DAMAGES SUSTAINED MAY BE PROPERLY SUBMITTED TO A FACT FINDER, AND MUST BE SUBMITTED TO A FACT FINDER FOR DETERMINATION WHEN ONE OF THE THEORIES WHICH INVOLVES A DUPLICATIVE ACTUAL DAMAGE CLAIM WOULD, IF RECOVERED UPON, HAVE ENTITLED THE PLAINTIFFS TO SEEK ASSESSMENT OF EXEMPLARY OR PUNITIVE DAMAGES IN ADDITION TO ALL ACTUAL DAMAGES SUSTAINED.

Ellsworth Breihan Bldg. Co. v. Teha, Inc., 48 S.W.3d 80 (Mo.App. E.D. 2001)

Kincaid Enterprises, Inc. v. Porter, 812 S.W.2d 892 (Mo.App. W.D. 1991)

Vogt v. Hayes, 54 S.W.3d 207 (Mo.App. S.D. 2001)

Whittom v. Alexander-Richardson, 851 S.W.2d 504 (Mo. 1993)

ARGUMENT

Point I

THE TRIAL COURT ERRED IN GRANTING THE MOTION OF FARM BUREAU FOR SUMMARY JUDGMENT ON COUNTS II - BREACH OF FIDUCIARY DUTY TO DEFEND, AND COUNT III - BREACH OF FIDUCIARY DUTY TO SETTLE, <u>BECAUSE</u> THERE WERE NOT UNCONTROVERTED ISSUES OF MATERIAL FACT BEFORE THE COURT OR A LACK OF GENUINE DISPUTE AS TO THE MATERIAL FACTS RELATIVE TO THE BREACH OF FIDUCIARY DUTY CLAIMS WHICH ENTITLED FARM BUREAU TO JUDGMENT AS A MATTER OF LAW ON COUNTS II AND III, <u>IN THAT</u>: THE FACTS WHICH WERE PRESENTED AND UNCONTROVERTED BEFORE THE COURT (L.F. 58-72 AND 74-76) ESTABLISHED THAT FARM BUREAU HAD NOT EFFECTIVELY CANCELED THE POLICY OF INSURANCE ISSUED TO BATEMAN FOR THE SIX MONTH POLICY PERIOD FROM AUGUST 2, 2002 THROUGH FEBRUARY 2, 2003 (L.F. 25) BECAUSE THE POLICY REQUIRED THE MAILING OF A NOTICE OF CANCELLATION FOR NON-PAYMENT OF PREMIUM AT LEAST TEN DAYS PRIOR TO THE CANCELLATION DATE (L.F. 63) AND FARM BUREAU'S NOTICE OF CANCELLATION WAS MAILED ON OCTOBER 10, 2002 WITH A CANCELLATION DATE OF OCTOBER 9, 2002, (L.F. 29 AND 42 ¶ 18) THEREBY PURPORTING TO EFFECT A CANCELLATION OF THE POLICY ONE DAY PRIOR TO THE MAILING OF THE NOTICE WHICH

WAS NOT IN STRICT COMPLIANCE WITH THE POLICY TERMS. (L.F. 58-73) THE CANCELLATION NOTICE WAS THEREFORE WHOLLY INEFFECTUAL. THE ACCIDENT OF DECEMBER 23, 2002 OCCURRED WITHIN THE POLICY PERIOD OF AUGUST 2, 2002 THROUGH FEBRUARY 2, 2003. (L.F. 9, 25) THE TRIAL COURT CORRECTLY DETERMINED THAT THE CANCELLATION NOTICE WAS INEFFECTIVE AND THAT COVERAGE UNDER THE POLICY WAS INDEED IN EFFECT ON THE DATE OF THE ACCIDENT ON DECEMBER 23, 2002, AND, AS SUCH, THE FAILURE OF FARM BUREAU TO DEFEND BATEMAN OR SETTLE THE CLAIMS AND SUITS AGAINST BATEMAN WITHIN THE POLICY LIMITS CONSTITUTED, AT A MINIMUM, A BREACH OF THE INSURANCE CONTRACT BY FARM BUREAU. (L.F. 495-497) THE TRIAL COURT APPROPRIATELY ASSESSED ACTUAL DAMAGES RESULTING FROM ITS BREACH OF CONTRACT AS SOUGHT BY PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT. (L.F. 495-497) HOWEVER, THE DUTY OF FARM BUREAU TO DEFEND BATEMAN AND THE DUTY OF FARM BUREAU TO SETTLE WITHIN POLICY LIMITS ARE, AS A MATTER OF LAW, FIDUCIARY DUTIES BY REASON OF THE POLICY LANGUAGE WHICH RESERVED UNTO FARM BUREAU THE EXCLUSIVE RIGHT TO SETTLE AND DEFEND ANY COVERED CLAIMS AS IT DEEMED APPROPRIATE. (L.F. 63) [<u>DUNCAN v. ANDREW COUNTY MUTUAL INSURANCE</u>, 665 S.W.2d 13 (MO.APP. W.D. 1983)] THE POLICY FURTHER PROHIBITED ITS INSURED, BATEMAN,

EXCEPT AT HER OWN COST, FROM ASSUMING ANY OBLIGATION, MAKING ANY PAYMENT, OR INCURRING ANY EXPENSE OTHER THAN THOSE WHICH MIGHT HAVE BEEN ATTRIBUTABLE TO IMMEDIATE MEDICAL OR SURGICAL RELIEF REQUIRED BY OTHERS AT THE TIME OF THE ACCIDENT, (L.F. 215) THEREBY CREATING A FORFEITURE PROVISION IN THE EVENT BATEMAN DID NOT ALLOW FARM BUREAU THE OPPORTUNITY TO CONTROL THE DEFENSE AND SETTLEMENT AND THEREBY PROTECT HER. THE DUTY OF FARM BUREAU TO DEFEND WAS A FIDUCIARY DUTY, IN ADDITION TO BEING A GENERAL CONTRACTUAL DUTY OR OBLIGATION. THE DUTY OF FARM BUREAU TO SETTLE WAS A FIDUCIARY DUTY, IN ADDITION TO BEING A GENERAL CONTRACTUAL DUTY OR OBLIGATION. THE BREACH OF A FIDUCIARY OBLIGATION AND PROOF OF THE SAME ENTITLES A PARTY ESTABLISHING SUCH A BREACH UNDER CIRCUMSTANCES WHERE WANTON AND RECKLESS DISREGARD OF THE RIGHTS OF OTHERS IS SHOWN, TO SUBMIT TO THE TRIER OF FACT A CLAIM FOR EXEMPLARY OR PUNITIVE DAMAGES WHICH THE COURT ERRONEOUSLY DENIED IN CONJUNCTION WITH THE GRANT OF SUMMARY JUDGMENT ON THE PLAINTIFFS' CLAIMS FOR BREACH OF FIDUCIARY DUTIES AS SET FORTH WITHIN COUNTS II AND III.

Standard Of Review

Appellate Court review of a trial court order granting summary judgment is essentially de novo. The record is reviewed in the light most favorable to the party against whom judgment was entered and the non-moving party is granted the benefit of all reasonable inferences from the record. An order of summary judgment may be affirmed under any theory, which is supported by the record. In re: Estate of Blodgett, 95 S.W.3d 79 (Mo. 2003); Jones v. Brashears, 107 S.W.3d 441 (Mo.App. S.D. 2003); Blunt v. Gillette, 124 S.W.3d 502 (Mo.App. S.D. 2004).

Argument

Fiduciary Duties Of Liability Insurer

Missouri courts have held that a liability insurer owes a fiduciary duty to its insured when a liability claim is made, if the insurer has reserved unto itself as part of the contract terms within its policy, the right to control settlement and defense of any claim or suit. Duncan v. Andrew County Mutual Insurance Company, 665 S.W.2d 13 (Mo.App. W.D. 1983). In the Duncan case, the court stated, on page 18 of its opinion, in pertinent part, the following:

> "By was of explication, an insurer's right to control settlement and litigation under a policy of liability insurance creates a fiduciary relationship between insurer and insured".

In Freeman v. Leader National Insurance Company, 58 S.W.3d 590 (Mo.App. E.D. 2001), the Court, in citing Duncan v. Andrew County Mutual Insurance reiterated the rule that an insurer's right to control settlement and litigation under a liability insurance policy creates a fiduciary relationship between insurer and an insured.

The Missouri Supreme Court in Grewell v. State Farm Mutual Auto Insurance Company, 102 S.W.3d 33 (Mo. 2003) analogized the relationship between a liability insurer and its insured as that of an attorney client relationship. An attorney client relationship is of course one which is fiduciary in nature.

In the case at hand, Farm Bureau contracted with Bateman in its auto liability insurance policy in a manner that allowed it to control defense and to control settlement. (L.F. 204) The pertinent language on page 1 of the policy under part A - Liability Coverage Insuring Agreement (L.F. 204) provides:

> "We will pay damages for bodily injury or property damage for which any insured becomes legally responsible because of an auto accident. We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. We have no duty to defend any suit or settle any claim for bodily injury or property damage not covered under this policy."

In addition, Farm Bureau's policy contained, what amounts to a forfeiture provision, in the event its insured undertook on her own to make any payment or assume any obligation or expense. (L.F. 215) Page 12 of the Farm Bureau policy (L.F. 215), in addition to providing a cooperation clause, stated at paragraph 5, the following:

> "The insured will not, except at his own cost, voluntarily make any payment, assume any obligation, or incur any expense other than for such immediate medical or surgical relief to others required at the time of the accident."

The language in the Farm Bureau policy quoted above creates the very type of relationship, fiduciary in nature, as recognized by Duncan v. Andrew County Mutual Insurance Company; Freeman v. Leader National Company and Grewell v. State Farm Mutual Auto Insurance Company.

A breach of a fiduciary duty is a species of fraud. Schimmer v. H.W. Freeman Const. Co., 607 S.W.2d 767 (Mo.App. E.D. 1980) It may be asserted as a tort claim, and, under a proper case, exemplary or punitive damages may be available, in addition to assessment of actual damages sustained.

Breach Of Fiduciary Duty Claims Asserted Against Farm Bureau

The Stones' asserted breach of fiduciary duty on the part of Farm Bureau in Count II and III of the Amended Petition (L.F. 8-39). Count II asserted that Farm Bureau breached its fiduciary obligations in refusing to defend Bateman and denying any coverage obligation based upon its ineffective cancellation notice. Count III asserted a breach of fiduciary duty on the part of Farm Bureau in its failure to settle the suits filed by the Stones then pending against Bateman, for a sum within the policy limits when given an opportunity to do so. The opportunity to settle within policy limits was substantiated before the trial court by virtue of the demand letter attached as Exhibit "B" to the Stones' Amended Petition dated August 18, 2003 (L.F. 10 ¶ 14 and 26-27) and Farm Bureau's acknowledgment of receipt of that demand letter on August 22, 2003. (L.F. 42 ¶ 14) Within the demand letter of August 18th, 2003 demand was made for settlement of both suits for a total sum of $900,000.00 or the policy limits, whichever was less. (L.F. 26-27) Farm Bureau neither defended or responded to the August 18, 2003 demand letter. Farm Bureau confirmed in writing its position that there was no coverage due to its October 10, 2002 cancellation notice, by letter to counsel for the Stones dated October 15, 2003. (A 11) Judgments were rendered against Bateman, Farm Bureau's insured, January 6, 2004. (L.F. 32-35)

It is conceded that there are no reported Missouri cases where a liability insurer has been held responsible on a claim asserting breach of fiduciary duty in failing to defend, or in breach of fiduciary duty for failure to settle. However, it is respectfully submitted that the case law referenced above indicates that there is such a duty under these types of circumstances. Breach of any duty recognized by law should afford an opportunity for remedy.

It is anticipated that Farm Bureau will urge that its failure to defend constituted nothing more than a breach of contract. Farm Bureau may claim that it could not be held responsible for breach of fiduciary duty in failing to defend Bateman as it never undertook to provide defense.

It should be remembered that in Missouri, the duty to defend is broader than the duty to indemnify by settling or paying a judgment rendered. Butters v. City of Independence, 513

S.W.2d 418 (Mo. 1974); McCormack Baron Mgt. v. American Guarantee, 989 S.W.2d 168 (Mo. 1999).

Any assertion by Farm Bureau that no fiduciary duty arose under the facts of this case because it did not undertake to provide defense at any time is incorrect. It is not the existence of a claim covered by the policy and defense being provided by an insurer which gives rise to the fiduciary relationship. The fiduciary relationship was contracted for by virtue of the language within the policy wherein Farm Bureau reserved unto itself the right to control defense and settlement. Once a claim was made against Bateman, which was covered by the policy, Farm Bureau's fiduciary obligations were triggered and it was legally required to discharge its fiduciary obligations by proceeding with defense of Bateman and, when given opportunity to protect her, effect settlement within the policy limits.

Any claim to the effect that a fiduciary duty arises only when defense is undertaken could be likened to a situation where an express trust is created and the trustee or fiduciary under the trust completely fails or refuses to undertake any activity whatsoever to discharge trust obligations. It is submitted that any defense by a trustee under such a situation that he could not be held liable for breach of a fiduciary duty, because he never undertook to discharge his fiduciary duties, would seem rather ridiculous. The same would hold true for Farm Bureau in this case. When a claim was made against Bateman for the wrongful death of Zella Nadine Stone and for the personal injuries of Albert Stone, Farm Bureau, once notified of the claims and the suits, was then responsible for faithfully discharging its obligations under the policy which were fiduciary in nature because it reserved unto itself the right to control defense and settlement.

The trial court found that there was indeed coverage within the liability insurance policy issued by Farm Bureau and that the coverage was in effect on the date of the accident, December 23, 2002. (L.F. 32-35) Although the court determined that plaintiffs were entitled to recover on a breach of contract theory, such determination did not preclude plaintiffs from pursuing their breach of fiduciary duty claims. The law recognizes a fiduciary duty on the part of an insurer which had contracted to control defense and settlement to the exclusion of the insured. The duty was obviously not fulfilled and plaintiffs should have had an opportunity to effect recovery on those claims, even though the actual damages may have been overlapping.

The trial courts grant of Farm Bureau's Motion for Summary Judgment as to the breach of fiduciary duty claims was required to have been premised on the finding of uncontroverted material facts or lack of any genuine dispute as to material facts warranting the grant of summary judgment in favor of Farm Bureau on the breach of fiduciary duty claims as a matter of law. Review of Farm Bureau's Statement of Uncontroverted Material Facts (L.F. 274) which was submitted with its Motion for Summary Judgment or in the Alternative, Motion for Partial Summary Judgment (L.F. 271), shows a number of purported factual statements which Farm Bureau claims were uncontroverted and supported its motion for summary judgment. (L.F. 274-277) The Stones responded to the asserted uncontroverted material facts submitted by Farm Bureau. (L.F. 484-489) A review of Farm Bureau's Statement of Uncontroverted Material Facts and the Stones response to the same reveals that in most instances, the statements are legal conclusions, or, statement of non-material and irrelevant facts. None of the factual statements specifically address the Stones' claims for breach of fiduciary duties.

A claim for breach of fiduciary duty is considered akin to constructive fraud. Klemme v. Best, 941 S.W.2d 493 (Mo. 1997). In Savannah Place, Ltd. v. Heidelberg, 122 S.W.3d 74, 81 (Mo.App. S.D. 2003) the Court reiterated the general rule set forth in Klemme, i.e. that a breach of fiduciary duty is constructive fraud, and further quoted in 50A C.J.S. Juries § 98 (1987) indicating that on a claim for breach of fiduciary duty, where parties are seeking money damages, they are entitled to a jury trial.

The claims asserted by plaintiffs in Count II and Count III, were in fact claims based upon the failure of Farm Bureau to fulfill its obligations to defend and settle. Farm Bureau's relationship to its insured, Bateman, was fiduciary in nature. The trial court's grant of summary judgment on the claims for fiduciary duty was improper as there was not, at any time, a statement of facts and evidentiary material before the court, submitted by Farm Bureau, or otherwise, to indicate that Farm Bureau was entitled to summary judgment on the breach of fiduciary duty claims.

The fact that the trial court determined, by its judgment, as indicated in paragraph 5 thereof (L.F. 495-497) that all resultant damages could be obtained by the Stones by virtue of the courts grant of summary judgment in favor of the Stones on their breach of contract claim asserted in Count I, was not justification for granting summary judgment on Counts II and III. The Stones were entitled to proceed to trial on their tort claims and have any duplication of damages resolved in a final formal judgment entered by the court. The trial courts grant of summary judgment in favor of Farm Bureau on Counts II and III of the Amended Petition was improper and should be reversed. Scott v. Blue Springs Ford Sales, Inc., 176 S.W.3d 140 (Mo. 2005)

<u>Point II</u>

THE TRIAL COURT ERRED IN GRANTING THE MOTION OF FARM BUREAU FOR SUMMARY JUDGMENT ON COUNT IV - BAD FAITH IN FAILING TO DEFEND, AND, COUNT V - BAD FAITH IN FAILING TO SETTLE <u>BECAUSE</u> THERE WAS NOT UNCONTROVERTED ISSUES OF MATERIAL FACT BEFORE THE COURT OR A LACK OF GENUINE DISPUTE AS TO THE MATERIAL FACTS WHICH ENTITLED FARM BUREAU TO JUDGMENT ON COUNTS IV AND V, INCLUSIVE, AS A MATTER OF LAW, <u>IN THAT</u>: THE FACTS WHICH WERE PRESENTED AND UNCONTROVERTED BEFORE THE COURT (L.F. 58-72 AND 74-76) ESTABLISHED THAT FARM BUREAU HAD NOT EFFECTIVELY CANCELED THE POLICY OF INSURANCE ISSUED TO BATEMAN FOR THE SIX MONTH POLICY PERIOD DATED FROM AUGUST 2, 2002 THROUGH FEBRUARY 2, 2003 (L.F. 25) BECAUSE THE POLICY REQUIRED THE MAILING OF A TEN DAY NOTICE OF CANCELLATION FOR NON-PAYMENT OF PREMIUM. (L.F. 63) FARM BUREAU'S CANCELLATION NOTICE WAS MAILED ON OCTOBER 10, 2002, PURPORTING TO SET FORTH A CANCELLATION DATE EFFECTIVE OCTOBER 9, 2002, (L.F. 29 and 42 ¶ 18) THEREBY PURPORTING TO EFFECT A CANCELLATION OF THE POLICY ONE DAY PRIOR TO THE MAILING OF THE NOTICE WHICH WAS NOT IN STRICT COMPLIANCE WITH THE POLICY TERMS . (L.F. 58-73) THE CANCELLATION NOTICE WAS THEREFORE WHOLLY INEFFECTUAL. THE ACCIDENT OF

DECEMBER 23, 2002 OCCURRED WITHIN THE POLICY PERIOD OF AUGUST 2, 2002 THROUGH FEBRUARY 2, 2003. (L.F. 495-497) THE TRIAL COURT CORRECTLY DETERMINED THAT THE CANCELLATION NOTICE WAS INEFFECTIVE AND THAT COVERAGE UNDER THE POLICY WAS IN EFFECT ON THE DATE OF THE ACCIDENT, DECEMBER 23, 2002, AND, AS SUCH, THE FAILURE OF FARM BUREAU TO DEFEND BATEMAN OR SETTLE THE CLAIMS AND SUITS AGAINST BATEMAN WITHIN THE POLICY LIMITS CONSTITUTED A BREACH OF THE INSURANCE CONTRACT BY FARM BUREAU. THE LAW ON CANCELLATION OF AN INSURANCE POLICY FOR NON-PAYMENT OF PREMIUM, REQUIRING STRICT COMPLIANCE WITH THE POLICY PROVISIONS IN ORDER TO EFFECT A CANCELLATION FOR NON-PAYMENT OF PREMIUM, HAD NOT CHANGED IN MISSOURI FOR OVER FORTY YEARS. [MFA MUTUAL INS. CO. v. SOUTHWEST BAPTIST COLLEGE, INC., 381 S.W.2d 797 (MO. 1964)]; [CAIN v. ROBINSON LUMBER CO., 295 S.W.2d 388 (MO. 1956)] FARM BUREAU WAS CHARGED WITH KNOWLEDGE OF THE LAW IN THE STATE OF MISSOURI ON CANCELLATION FOR NON-PAYMENT OF PREMIUM, [BOWLES v. ALL COUNTIES INV. CORP. 46 S.W.3d 636 (MO.APP. S.D. 2001)] AND FARM BUREAU'S REFUSAL TO DEFEND BATEMAN (COUNT IV) AND REFUSAL TO SETTLE THE CLAIMS AND SUITS AGAINST BATEMAN (COUNT V) COULD HAVE BEEN DETERMINED BY A FACT FINDER TO AMOUNT TO BAD FAITH IN EACH INSTANCE, UNDER THE

CIRCUMSTANCES, WHICH INDICATED THAT THE CONDUCT OF FARM BUREAU MAY HAVE AMOUNTED TO A DISHONEST DISREGARD OF ITS DUTY TO PROTECT BATEMAN BY (1) REFUSING TO PROVIDE DEFENSE OF THE SUITS INSTITUTED AGAINST HER AND/OR (2) SETTLING THE SUITS AGAINST HER FOR THE POLICY LIMITS AFTER WRITTEN DEMAND FOR SUCH SETTLEMENT HAD BEEN PROVIDED ON TWO OCCASIONS. (L.F. 26-28) FARM BUREAU HAD BEEN GIVEN AMPLE OPPORTUNITY TO DEFEND AND SETTLE, INSTEAD, FARM BUREAU RELIED UPON ITS WHOLLY INEFFECTIVE CANCELLATION NOTICE AS AN EXCUSE NOT TO UNDERTAKE AND DISCHARGE ITS CONTRACTUAL OBLIGATIONS, WHICH RELIANCE WAS NOT IN GOOD FAITH AND COULD HAVE BEEN INTERPRETED AS, IN FACT, DISHONEST CONDUCT BY FARM BUREAU IN FAILING AND REFUSING TO LOOK OUT FOR THE INTERESTS OF BATEMAN, TO THE EXCLUSION OF ITS OWN FINANCIAL INTERESTS, AND THEREBY PROTECT HER IN DEFENDING AND EFFECTING SETTLEMENT OF THE SUITS AGAINST HER.

Standard of Review

Appellate Court review of a trial court order granting summary judgment is essentially de novo. The record is reviewed in the light most favorable to the party against whom judgment was entered and the non-moving party is granted the benefit of all reasonable inferences from the record. An order of summary judgment may be affirmed under any theory which is supported by the record. In re: Estate of Blodgett, 95 S.W.3d 79 (Mo. 2003); Jones v. Brashears, 107 S.W.3d 441 (Mo. App. S.D. 2003); Blunt v. Gillette, 124 S.W.3d 502 (Mo. App. S.D. 2004)

Argument

The trial court correctly determined that the Plaintiff's' Motion for Partial Summary Judgment on Count I, Breach of Contract, should be granted. However, the trial court erred in finding that summary judgment was appropriate for Farm Bureau on the Stones claims set forth within Count III, Bad Faith in Failure to Defend and Count IV, Bad Faith in Failure to Settle. (L.F. 495-497)

Farm Bureau, in refusing to defend Bateman, and refusing to settle the suits against her for wrongful death and personal injury, relied upon its cancellation notice issued on October 10, 2002, which purported to effect cancellation of the policy the previous day, October 9, 2002. L.F. 29. The accident which gave rise to the suits for personal injury and wrongful death occurred on December 23, 2002 (L.F. 9) which was within the coverage period provided by the policy of insurance which Farm Bureau had issued to Bateman. (L.F. 25)

The Motion for Summary Judgment of Farm Bureau, which the Court granted, in part, in dismissing Count III, Bad Faith in Failure to Defend and Count IV, Bad Faith in Failure to Settle was improper, and was in error, due to the fact that recovery of a partial summary judgment on Count I, Breach of Contract, did not preclude the plaintiffs from proceeding to trial on their claims for bad faith.

Bad Faith - Generally

The law in Missouri is such that a duty of good faith has been consistently recognized in all contractual relationships. Farmers' Electric v. Missouri Department of Corrections, 977 S.W.2d 266, 271 (Mo. 1998). In Martin v. Prier Brass Mfg. Co., 710 S.W.2d 466 (Mo. App. W.D. 1986), the Western District of the Missouri Court of Appeal stated, in pertinent part, at page 473 the following:

> "It is a fundamental principle and concomitant of agreements that: 'Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.' Restatement (Second) of Contracts §205 (1981). That duty prevents one party to the contract to exercise a judgment conferred by the express terms of agreement in such a manner as to evade the spirit of the transaction or so as to deny the other party the expected benefit of the contract. 1A Corbin on Contracts §165 (1963);..."

General legal treatises have consistently recognized the duty of good faith, implied as a matter of law, in all contractual relationships, e.g., 5 Williston on Contracts 3d Ed. (1961) §670 at 159; 17A C.J.S. Contracts §328 at 284-287.

In adopting the Uniform Commercial Code in 1963, Missouri obtained a codification of the obligation of good faith at §400.1-203 RSMo. which still provides: "Every contract or duty within this chapter imposes an obligation of good faith in its performance or enforcement." Further, good faith is defined at §400.1-201 (19) RSMo. as follows: "Good faith" means honesty in fact in the conduct or transaction concerned." It should also be noted that the entire commercial code was intended to supplement general principles of our law unless displaced by particular provisions of the code. §400.1-103 RSMo.

Although a number of cases have treated the breach of the obligation of good faith implied in every contract, i.e. bad faith, as a claim sounding in contract, it is submitted that it should be appropriately considered either as a tort claim or as a contract claim.

In distinguishing a claim as one sounding in contract, or in tort, the court's attention is directed to Helm v. Inter-Insurance Exchange for Automobile Club of Missouri, 192 S.W.2d 417 (Mo. 1946) which cited an earlier opinion of Lowery v. Kansas City, 85 S.W.2d 104 (Mo. 1935) and reiterated the rule applicable in determining whether an action for wrong sustained by a plaintiff lies in contract or in tort, and stated, in pertinent part, the following:

> "A fundamental test of whether one person has a cause of action in tort against another is: Did the person sought to be held liable owe to the person, seeking to recover, any duty, to do something he did not do, or not do something he did do? If so, his failure to do what he ought to have done or his doing what he ought not to have done constitutes a legal wrong, whether it be intentional or merely negligent, for which the person injured can recover.... In discussing the circumstance in which a tort action which grew out of a contract may be maintained, we said '...Though a tort is

> a breach of a duty which the law in distinction from a mere contract has imposed, yet the imposing of it may have been because of a contract or because of it and something else combining, when otherwise it would not have created duty,' but breach of contract may only 'be treated as a tort where the law casts its separate obligation."

As previously established, the law casts its separate obligation of a duty of good faith in every contract. An insurance contract in not exempt from the rule. The legal implication of a duty of good faith in every contract is no less viable than the implication of the duty not to undertake the discharge of one's duties under a contract in a negligent fashion which may cause injury, or the implied duty not to engage in fraudulent conduct during the course of the performance of the contract. The breach of a duty implied as a matter of law may be asserted as a breach of contract claim or as a tort.

The court's attention is directed to Cummins Missouri Diesel Sales v. Eversole, 332 S.W.2d 53 (Mo. App. E.D. 1960) wherein the court stated at page 57 through 58, the following:

> "In order to determine the character of the action, whether ex contractu or ex delicto, it is necessary to ascertain the source of the duty claimed to have been violated. If this duty is one imposed merely by the contract, then any action for the breach thereof is necessarily ex contractu. Fuch v. Parson's

> Construction Co., 166 Neb. 188, 88 N.W.2d 648. On the other hand, if a party sues for breach of duty prescribed by law as an incident of the relation or status which the parties have created by their agreement, the action may be one in tort, even though the breach of duty may also be a violation of the terms of the contract. Wernick vs. St. Louis and S.F.R. Co., 131 (Mo. App. 37), 109 S.W. 1027. In such a case, the party has a choice whether to proceed in tort for violation of the duty imposed by law, or by an action on the contract for breach of the contractual obligation."

In Davidson v. Hess, 673 S.W.2d 111 (Mo.App. E.D. 1984) the Court of Appeals, in addressing the issue of whether a claim sounds in contract or tort, stated at page 112, the following:

> "To determine the character of the action alleged below, whether ex contractu or ex delicto, it is necessary to ascertain the source of the duty claimed to have been violated. If this duty is one imposed merely by the contract, then any action for the breach thereof is necessarily ex contractu. On the other hand, if a party sues for breach of duty prescribed by law as an incident of the relation or status which the parties have created by their agreement, the action may be one in tort, even though the breach

of duty may also be a violation of the terms of the contract. In such a case, the party has a choice whether to proceed in tort for violation of the duty imposed by law, or by an action on the contract for breach of the contractual obligation."

Further support for the assertion that a claim for bad faith arising out of a general commercial transaction may be asserted as a tort may be found in analysis of the only statutory definition that we have in the State of Missouri for "good faith" found within our commercial code §400.1-201(19) RSMo. referenced earlier. If good faith means honesty in fact in the conduct or transaction concerned, bad faith necessarily must imply dishonesty in fact in the conduct or transaction concerned. It is difficult to perceive how or why dishonest conduct could not be treated as a tort, in addition to being a breach of contract.

Insurance Bad Faith

The Missouri Supreme Court adopted bad faith as a tort in liability insurance cases in Zumwalt v. Utilities Ins. Co., 228 S.W.2d 750 (Mo. 1950). In its reasoning, at page 754, the Missouri Supreme Court in the Zumwalt case quoted with approval prior decisions holding that bad faith is a state of mind, provable by circumstantial as well as direct evidence, with each case standing, and to be determined upon its own particular state of facts.

Approximately fifteen years after the Zumwalt decision, the Missouri Court of Appeals Western District in Landie v. Century Indemnity Co., 390 S.W.2d 558 (Mo. App. W.D. 1965) stated at page 563 that:

> "It is now beyond dispute in Missouri and in most, if not all, of the other jurisdictions in the United States, that where the company does not assume the defense of a suit against its insured it may be liable over and above its policy limits if it acts in bad faith..."

The court in Landie went on in the course of its opinion, at page 563, to adopt the concept of honesty as an indicator of good or bad faith and stated:

> "Bad faith is shown by the failure of the company to act honestly to save the insured harmless as it has contracted to do in its policy. Good faith requires the company to make any settlement within the policy limits that an honest judgment and discretion dictates."

The Missouri Eastern District Court of Appeals sought to delineate the elements of the tort of insurance bad faith in Dyer v. General American Life Insurance Company, 541 S.W.2d 702 (Mo.App. E.D. 1976). The elements of the tort claim of bad faith in the liability insurance context as set forth in Dyer have been picked up and repeated in numerous decisions following its publication, perhaps to ill effect. First, it should be remembered, that as the Supreme Court pointed out in Zumwalt, a claim of bad faith in a liability insurance context is one, which is substantiated by the intent of the insurance company, provable by circumstantial as well as direct evidence and that each case must be determined on its particular facts. Secondly, the elements of a bad faith claim as outlined in Dyer are suspect by virtue of the fact that Dyer involved a first party claim to recover accidental injury benefits from an insurance policy by the insured. Dyer did not involve a claim by an insured that its liability insurer failed to defend and/or failed to effect settlement within policy limits and thereby protect the insured as it had contracted to do. The Court of Appeals in the Dyer decision declined to extend the concept of the tort of bad faith to a first party insurance claim (see Dyer at page 705). However, and perhaps unfortunately, the court sought to define the elements of such a claim, which was not before it, Dyer at 704. That part of the opinion of Dyer which purported to set forth the elements of a claim for insurance bad faith has been questioned, e.g., Gannaway v. Shelter Mutual Insurance Company, 795 S.W.2d 554 (Mo.App. S.D. 1990), at page 564 and the concurring opinion by Judge Schrum in State Farm v. Metcalf By Wade, 861 S.W. 2d 751 (Mo.App. S.D. 1993).

Bad Faith Claims Against Farm Bureau

The material facts before the trial court at the time it conducted hearing on the Plaintiff's Motion For Partial Summary Judgment, on its breach of contract claim, and Farm Bureau's Motion For Summary Judgment On All Claims Or In the Alternative For Partial Summary Judgment, established for the court:

1. Farm Bureau was aware of suits instituted against its insured, Bateman, by virtue of having admitted receiving plaintiff's demand letter of September 19, 2003 (L.F. 26-27) and the demand letter from Bateman's attorney of August 18, 2003 (L.F. 28, 30-31) and (L.F. 75, ¶ 4 and 5).

2. Farm Bureau claimed that it had no coverage obligation by virtue of its

cancellation notice issued on October 10, 2003, purporting to effect the cancellation of the policy on October 9, 2003 (L.F. 29) and (L.F. 41, ¶ 7).

3. Farm Bureau did not provide defense or endeavor to effect settlement of the claims and suits against Bateman (L.F. 61, ¶ 6 and 7) and (L.F. 75, ¶ 6 and 7).

4. Judgement was obtained against Bateman on January 6, 2004 on the suits of Albert and Tammy Stone against Bateman for the wrongful death of Zella Nadine Stone with damages assessed in the amount of $368,000.00. (L.F. 32-33). Further, Judgment was obtained on January 6, 2004 in the personal injury suit of Albert Stone against Bateman. Damages were assessed in the amount of $538,000.00. (L.F. 34-35).

It should be noted that Farm Bureau's reliance upon its cancellation notice issued on October 10, 2002, purporting to effect cancellation on the previous day, October 9, was in plain contradiction with its policy terms relating to cancellation for non-payment of premium (L.F. 63) and firmly established law in the State of Missouri holding to the contrary. Case law had been in existence for over forty years, holding that an insurer cannot cancel a policy unless it has met all conditions precedent and any cancellation notice which does not comply with the strict terms of the policy is abortive and wholly ineffectual. Cain v. Robinson Lumber Co., 295 S.W.2d 388 (Mo. 1956); MFA Mutual Insurance Co. v. Southwest Baptist College, Inc., 381 S.W.2d 797 (Mo. 1964); Dyche v. Bostian, 229 S.W.2d 25 (Mo.App. W.D. 1950) quoted with approval in MFA Mutual v. Southwest Baptist College in 1964.

The ruling in Cain v. Robinson Lumber and MFA Mutual Insurance Company v. Southwest Baptist College had been addressed, approved and reiterated by the Missouri Supreme Court in Blair By Snider v. Perry County Mutual, 118 S.W.3d 605 (Mo. 2003). It is submitted that it is clear that Farm Bureau knew that its cancellation notice of October 10, 2002 was wholly ineffective to effect cancellation. Everyone is presumed to know the law. Bowles v. All Counties Inv. Corp., 46 S.W.3d 636 (Mo. App. S.D. 2001). Presumably Farm Bureau would have some expertise in the cancellation of liability insurance policies for non-payment of premium and as a result, would have been even more keen to the state of the law on such cancellation efforts.

Trial Court's Ruling Granting Summary Judgment on Bad Faith Claims

In granting Farm Bureau's Motion for Summary Judgment on the Stones bad faith claims, the court must necessarily have relied upon the Statement of Uncontroverted Facts set forth within Farm Bureau's motion seeking, in part, the relief granted. (L.F. 274- 277) In addition, before the trial court were the responses to those statements submitted by the Stones, (L.F. 484-489), as well as perhaps the other documents submitted in conjunction with the hearing on the Stones' Motion For Partial Summary Judgment. (L.F. 58-63) The response to the Stones' motion, (L.F. 74-270) included a statement of additional material facts which Farm Bureau contended were in dispute. (L.F. 77-81) The Stones' reply to Farm Bureau's asserted additional facts was also before the trial court at the time of hearing on January 20, 2005. (L.F. 478-483) A review of the fact statements which Farm Bureau contended were established reveal, as previously pointed out, that they were, essentially statements of legal conclusions or statements of fact which were not material to either the coverage issue or the failure or refusal of Farm Bureau to defend or settle. Farm Bureau did not have before the trial court a statement of uncontroverted material facts which support the granting of summary judgment on the claims of bad faith as a matter of law.

It is submitted that the conduct of Farm Bureau under all the facts and circumstances, as well as the existing law on cancellation for non-payment of premium, substantiates that it was engaged in a practice of dishonest conduct by virtue of its avoidance and deceit. From August 22, 2003 when Farm Bureau received notice, in the form of the demand letter of August 18, 2003, (L.F. 26) until January 6, 2004 when judgments were rendered against Bateman, the record before the Court does not reveal that Farm Bureau undertook an investigation of the claims and suits. The record does not reveal that Farm Bureau hired a lawyer to defend Bateman under a reservation of rights, although Farm Bureau engaged counsel for itself. (A12 thru A16) The record does not reveal that Farm Bureau filed a declaratory judgment action in order to have its coverage obligations determined. The reason the record does not reflect these activities on the part of Farm Bureau, anytime after the December 22, 2003 accident date, or in the three and one-half month period from the time it was notified of the suits and demand for settlement was made, until judgments were obtained, (August 22, 2003 – January 6, 2004) is because it did not engage in such activity.

Instead, Farm Bureau hired an attorney for itself, relied upon an ineffective notice of cancellation and continued to claim that it owed no obligation under its liability insurance policy, although legal authority to the contrary, which had been in existence for over forty years, clearly indicated that it was wrong.

As indicated in both Zumwalt v. Utilities Ins. Co. and Landie v. Century Indemnity Co., the determination of whether conduct on the part of an insurance company amounts to bad faith is a determination based upon the intent of the insurance company to be determined by a finder of fact. The trial court erred in granting summary judgment in favor of Farm Bureau on the Stones' claims for bad faith asserted in Counts III and IV of Plaintiff's Amended Petition.

<u>Point III</u>

THE TRIAL COURT ERRED IN GRANTING THE MOTION OF FARM BUREAU FOR SUMMARY JUDGMENT ON THE PLAINTIFFS' CLAIM FOR ASSESSMENT OF EXEMPLARY OR PUNITIVE DAMAGES IN ADDITION TO ALL ACTUAL DAMAGES SUSTAINED (COUNT VI) <u>BECAUSE</u> THERE WAS NOT UNCONTROVERTED ISSUES OF MATERIAL FACT BEFORE THE COURT OR A LACK OF GENUINE DISPUTE AS TO THE MATERIAL FACTS BEFORE THE COURT WHICH ENTITLED FARM BUREAU TO SUMMARY JUDGMENT ON THE TORT THEORIES ASSERTED IN COUNTS II, III, IV, OR V, INCLUSIVE, AS A MATTER OF LAW. RECOVERY BY THE PLAINTIFFS ON ANY OF THE TORT THEORIES WOULD HAVE ENTITLED PLAINTIFFS TO SUBMIT TO THE TRIAL COURT AND A FINDER OF FACT (JURY) THE DETERMINATION AS TO WHETHER THE CONDUCT OF FARM BUREAU UNDER ALL OF THE CIRCUMSTANCES WERE SUCH THAT EXEMPLARY OR PUNITIVE DAMAGES SHOULD BE ASSESSED, IN ADDITION TO ALL ACTUAL DAMAGES SUSTAINED, <u>IN THAT</u>: BREACH OF A FIDUCIARY DUTY IS RECOGNIZED AS A TORT IN MISSOURI, [<u>SCHIMMER v. H.W. FREEMAN CONST. CO.</u>, 607 S.W.2d 767 (MO.APP. E.D. 1980)] ENTITLING A PARTY TO SUBMIT TO THE TRIAL COURT AND A FACT FINDER FOR DETERMINATION AS TO WHETHER THE PARTY WHICH HAS BREACHED A FIDUCIARY DUTY SHOULD BE REQUIRED TO PAY EXEMPLARY OR PUNITIVE DAMAGES, IN ADDITION TO ACTUAL

DAMAGES SUSTAINED. BAD FAITH ON THE PART OF AN INSURANCE COMPANY IS RECOGNIZED AS A TORT IN THE STATE OF MISSOURI [ZUMWALT v. UTILITIES INS. CO., 228 S.W.2d 750 (MO. 1950)] THEREBY ENTITLING A PARTY THAT ESTABLISHES ACTUAL DAMAGES ATTRIBUTABLE TO BAD FAITH TO SUBMIT TO THE TRIAL COURT AND A FACT FINDER FOR DETERMINATION THE QUESTION AS TO WHETHER AN INSURANCE COMPANY WHICH HAS COMMITTED BAD FAITH SHOULD BE REQUIRED TO PAY EXEMPLARY OR PUNITIVE DAMAGES IN ADDITION TO ACTUAL DAMAGES SUSTAINED. THE DETERMINATION OF WHAT AMOUNT, IF ANY, EXEMPLARY OR PUNITIVE DAMAGES MAY BE ASSESSED IS A FACT QUESTION WHICH IS SUBJECT TO DETERMINATION BY A FINDER OF FACT OR JURY AND IS NOT A QUESTION FOR A COURT TO DISPOSE OF ON A SUMMARY JUDGMENT MOTION.

Standard Of Review

Appellate Court review of a trial court order granting summary judgment is essentially de novo. The record is reviewed in the light most favorable to the party against whom judgment was entered and the non-moving party is granted the benefit of all reasonable inferences from the record. An order of summary judgment may be affirmed under any theory which is supported by the record. In re: Estate of Blodgett, 95 S.W.3d 79 (Mo. 2003); Jones v. Brashears, 107 S.W.3d 441 (Mo.App. S.D. 2003); Blunt v. Gillette, 124 S.W.3d 502 (Mo.App. S.D. 2004). In addition, a decision to award punitive damages or submit the same to a jury rests within the discretion of the trial court after hearing all evidence at trial. Roberts Pallet Co., Inc. v. Molvar, 955 S.W.2d 586 (Mo.App. S.D. 1997)

Argument

In Count VI of the Stones' Amended Petition a claim for exemplary or punitive damages was set forth. (L.F. 21) More particularly, the Stones alleged that the conduct of Farm Bureau described in the claims and causes asserted within Count II - claim for breach of fiduciary duty to provide defense, Count III - claim for fiduciary duty to settle, Count IV - claim for bad faith in refusal to defend and Count V - claim for bad faith in failure and refusal to settle, was in either or all events alleged or asserted in each of those counts, intentional tortious conduct which was willful, wanton, and in reckless disregard of the rights of others. (L.F. 21 ¶ 54)

Exemplary or punitive damages may be awarded in cases involving only pecuniary harm, Haynam v. Laclede Elc. Co-Op, Inc., S.W.2d 148 (Mo.App. S.D. 1994).

Submission of a claim for exemplary or punitive damages to a jury warrants special judicial scrutiny because the instructional standards for such damages are not necessarily general. Alcorn v. Union Pacific Railroad Co., 50 S.W.3d 226 (Mo. 2001). Even though actual damages may be recovered by the Stones, the court determination not to submit a claim for exemplary or punitive damages may still constitute reversible error. Stojkovic v. Weller, 802 S.W.2d 152 (Mo. 1991). It is not so much the commission of an intentional tort as the conduct and motives, i.e., the defendant's state of mind, which prompted its wrongdoing that form the basis for punitive damages. Burris v. Burris, 904 S.W.2d 564, 570

(Mo.App. S.D. 1995)

In this case, Farm Bureau's motion for summary judgment and its statement of uncontroverted facts which it submitted to support its summary judgment motion (L.F. 271 - 277) did not specifically address the Stones' claims for exemplary or punitive damages. Farm Bureau submitted no affidavit or other extraneous evidence indicating that its conduct in regard to the claims against its insured, Bateman, was not intentional, willful, wanton, or in reckless disregard of the rights of its insured. Farm Bureau was required, in its motion, to establish by evidentiary facts, submitted in support of its motion, that the Stones' claim for exemplary or punitive damages must fail because there was no evidence indicating any intentional conduct that was willful, wanton, and in reckless disregard of the rights of Bateman. Farm Bureau presented no evidence of a lack of intentional conduct, willful and wanton, and in reckless disregard of the rights of Bateman.

What was before the court was the law in the State of Missouri as evidenced by MFA Mutual Insurance Company v. Southwest Baptist College, Inc., 381 S.W.2d 797 (Mo. 1964); Cain v. Robbinson Lumber Company, 295 S.W.2d 388 (Mo. 1956); each of which were reiterated as the existent law in Blair By Snider v. Perry County Mutual, 118 S.W.3d 605 (Mo. 2003). Long outstanding, unmodified legal authority established that a cancellation notice purporting to cancel a policy of insurance for non-payment of premium must be in strict compliance with the conditions provided in the policy for cancellation and, when a notice did not comply, it would be deemed abortive and wholly ineffectual. As previously noted, Farm Bureau was charged, and indeed presumed to know the law. Bowles v. All

Counties Inv. Corp., 46 S.W.3d 636 (Mo.App. S.D. 2001). The law as evidenced by the aforementioned authorities, had been well established for a time in excess of forty years when Farm Bureau sought to cancel Bateman's policy on October 10, 2002.

What was also before the trial court in documents submitted by Farm Bureau were eleven separate cancellation notices which had been issued by Farm Bureau to Bateman at various times when she had auto liability insurance or property insurance with Farm Bureau. (L.F. 123, 124, 127, 130, 133, 134, 144, 150, 157, 159 and 342) Each of the cancellation notices submitted by Farm Bureau show, in each instance, that they were dated in the upper left hand corner on the date that they were issued, and purported to establish a cancellation date prior to the date they were issued. It is submitted that a finder of fact when considering these matters could have determined that Farm Bureau was engaged in intentionally ignoring the forty year old legal standards on cancellation of insurance policies and had reckless or no regard for the rights of Bateman in regard to the same, at any time.

Farm Bureau's motion for summary judgment on the Stones' exemplary or punitive damages claim in Count VI was granted, without support in the material facts before the court. The trial court should have overruled the motion and thereby save an opportunity to determine whether exemplary or punitive damages were properly submissible to a jury for determination after hearing material evidence directed to the claim. Farm Bureau did not document with independent evidence, answers to interrogatories, deposition testimony, or responses to request for admission, indicating that it was not acting with intentional disregard of the rights of Bateman at the time it sought to cancel the liability insurance policy in question on October 10, 2002.

The Stones had sought to obtain deposition testimony from Farm Bureau's corporate counsel, Dana Frese of Jefferson City, Missouri. The court granted Farm Bureau's motion for protective order, in part, and held that plaintiffs could obtain deposition testimony from Dana Frese but that he could assert the attorney client privilege, and if asserted, he would not be allowed to testify at trial on issues to which he had asserted the privilege. (A 12-14)

As noted in the court's order, Dana Frese acted as counsel for Farm Bureau during the period of time in which it would have been engaged in acts amounting to bad faith and breach of Farm Bureau's fiduciary duties, i.e., September 19, 2003, until suit was filed against Farm Bureau, March 30, 2004. When hearing was conducted before the court on Farm Bureaus' motion for protective order regarding the deposing of attorney Dana Frese, portions of prior deposition testimony provided by Farm Bureau employees, Cindy Bisges, Janet Libbert, and Raymond Ledbetter, were presented to the court respectively as exhibits 1, 2, 3. In addition, a summary of the deposition testimony of each of the individuals, as it pertained to the involvement of attorney Frese was presented to the court. (A 15-16)

All of the testimony presented substantiated that attorney Frese was in charge of the claims and suits from September 19, 2003 and thereafter until suit was filed against Farm Bureau on March 30, 2004. Frese, although not an employee, maintains an office within the Farm Bureau Claims offices in Jefferson City, and, as to the claims against Bateman, was in charge of and entitled to direct the entire processes undertaken by Farm Bureau as to the suits against Bateman. (A 15-16) Farm Bureau hired a lawyer for itself when it learned of the suits against Bateman. It did nothing to protect Bateman.

Deposing of Dana Frese was not accomplished prior to the time the court entered its summary judgment.

These matters are brought to the attention of the Court to further substantiate that the trial courts grant of summary judgment on the Stones' claim for assessment of exemplary or punitive damages, was, at the very least, premature. The court did not have before it evidence of material facts to substantiate and prove the motion of Farm Bureau. The trial court was not in a position to determine whether a claim for assessment of exemplary or punitive damages should, within the courts discretion, be submitted to the jury.

The motion of Farm Bureau for summary judgment on Count VI - claim for exemplary or punitive damages, did not substantiate that it was entitled to the relief granted by the court. The trial courts judgment granting summary judgment for Farm Bureau on the exemplary or punitive damage claim was in error and should be reversed.

<u>Point IV</u>

THE TRIAL COURT ERRED IN GRANTING THE MOTION OF FARM BUREAU FOR SUMMARY JUDGMENT ON THE PLAINTIFFS' CLAIMS SET FORTH WITHIN COUNT II - BREACH OF FIDUCIARY DUTY TO DEFEND, COUNT III - BREACH OF FIDUCIARY DUTY TO SETTLE, COUNT IV - BAD FAITH IN FAILURE TO DEFEND, COUNT V - BAD FAITH IN FAILURE TO SETTLE, AND COUNT VI - CLAIM FOR EXEMPLARY OR PUNITIVE DAMAGES <u>BECAUSE</u> THE GRANTING OF THE PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT I, BREACH OF CONTRACT, AND ASSESSMENT OF ACTUAL DAMAGES, DID NOT ENTITLE THE TRIAL COURT, OR PRECLUDE THE PLAINTIFFS, AS A MATTER OF LAW, FROM PROCEEDING THROUGH TRIAL FOR DETERMINATION AND RESOLUTION BY A FACT FINDER OF THE SEPARATE TORT CLAIMS ASSERTED IN COUNTS II THRU V MERELY BECAUSE, AS THE COURT NOTED IN PARAGRAPH 5 OF ITS JUDGMENT, (L.F. 496) PLAINTIFFS WOULD BE OBTAINING FULL RECOVERY OF ACTUAL DAMAGES BY THE GRANT OF JUDGMENT BY THE TRIAL COURT ON COUNT I (BREACH OF CONTRACT) AND ASSESSMENT OF ALL ACTUAL DAMAGES SUSTAINED. EVEN THOUGH THE ACTUAL DAMAGES FOR THE CONDUCT AND THEORY OF RECOVERY ASSERTED IN COUNTS II THRU V WOULD, IF DETERMINED FAVORABLY TO THE PLAINTIFFS AT THE TIME OF TRIAL, INVOLVE ASSESSMENT OF THE

SAME ACTUAL DAMAGE AMOUNTS. RECOVERY UNDER COUNTS II THRU V, OR ANY OF THEM, WOULD HAVE ENTITLED PLAINTIFFS TO SUBMIT THEIR CLAIM FOR ASSESSMENT OF EXEMPLARY OR PUNITIVE DAMAGES TO A JURY <u>IN THAT</u> PLAINTIFFS WERE ENTITLED TO ASSERT MULTIPLE THEORIES OF RECOVERY, WHICH WERE NOT INCONSISTENT, WHETHER SOUNDING IN CONTRACT, OR IN TORT, AND WERE NOT REQUIRED TO MAKE ELECTION OF A THEORY OF RECOVERY ON CLAIMS OR THEORIES WHICH WERE NOT INCONSISTENT WITH THE BREACH OF CONTRACT CLAIM, UPON WHICH THE COURT DID GRANT JUDGMENT IN FAVOR OF PLAINTIFFS, BY REASON OF THE POSSIBLE ADDITIONAL DAMAGES IN THE FORM OF AN EXEMPLARY DAMAGE AWARD. THE FACT THAT THE ACTUAL DAMAGES UNDER THE DIVERSE THEORIES OF RECOVERY ASSERTED BY THE PLAINTIFFS IN COUNTS II THRU V INVOLVED PROOF AND ASSESSMENT OF THE SAME AMOUNT OF ACTUAL DAMAGES SUSTAINED DID NOT PRECLUDE PLAINTIFFS FROM PROCEEDING ON THEIR DIVERSE CLAIMS, THOSE SOUNDING IN TORT, AND PLAINTIFFS WERE ENTITLED TO SUBMIT TO A FACT FINDER THEIR THEORIES OF RECOVERY AND OBTAIN A JUDGMENT THEREON. IF PLAINTIFFS HAD EFFECTED RECOVERY ON ONE OR MORE OF THE TORT CLAIMS ASSERTED, OR ANY OF THEM, PLAINTIFFS WOULD, IN ADDITION TO ASSESSMENT OF THE ACTUAL DAMAGES, HAVE BEEN ENTITLED TO HAVE

A TRIAL COURT AND FACT FINDER DETERMINE PLAINTIFFS' CLAIM FOR EXEMPLARY OR PUNITIVE DAMAGES IN ADDITION TO ALL ACTUAL DAMAGES SUSTAINED. THEORIES OF RECOVERY WHICH WOULD BE DUPLICATIVE AS TO ACTUAL DAMAGES SUSTAINED MAY BE PROPERLY SUBMITTED TO A FACT FINDER, AND MUST BE SUBMITTED TO A FACT FINDER FOR DETERMINATION WHEN ONE OF THE THEORIES WHICH INVOLVES A DUPLICATIVE ACTUAL DAMAGE CLAIM WOULD, IF RECOVERED UPON, HAVE ENTITLED THE PLAINTIFFS TO SEEK ASSESSMENT OF EXEMPLARY OR PUNITIVE DAMAGES IN ADDITION TO ALL ACTUAL DAMAGES SUSTAINED.

Standard Of Review

Appellate Court review of a trial court order granting summary judgment is essentially de novo. The record is reviewed in the light most favorable to the party against whom judgment was entered and the non-moving party is granted the benefit of all reasonable inferences from the record. An order of summary judgment may be affirmed under any theory that is supported by the record. In re: Estate of Blodgett, 95 S.W.3d 79 (Mo. 2003); Jones v. Brashears, 107 S.W.3d 441 (Mo.App. S.D. 2003); Blunt v. Gillette, 124 S.W.3d 502 (Mo.App. S.D. 2004).

Argument

In the judgment of the trial court (L.F. 495-497) particularly paragraph 5 (L.F. 496), the court determined that its grant of summary judgment in favor of the Stones on Count I of their Amended Petition, claim for breach of contract claim, afforded the Stones an opportunity to effect full and complete recovery of all resultant damages due by reason of the failure of Farm Bureau to fulfill its obligations owed to Bateman under its policy of insurance. The court went on to hold that any recovery which might have been obtainable under the other counts in the Amended Petition would be duplicative of the damages determined by the court to be due on Count I, the breach of contract claim. Following these determinations, the court granted summary judgment in favor of Farm Bureau on Count II - claim for breach of fiduciary duty to defend, Count III - claim for breach of fiduciary duty to settle, Count IV - claim for bad faith in failure to defend, and, Count V - claim for bad faith in failure to settle.

The trial court apparently was of the opinion that the diverse claims asserted were overlapping in regard to actual damages and that recovery granted on one theory precluded the submission of the others. The judgment of the trial court was erroneous in that, even though the actual damages on Counts II thru V may have been overlapping and a mirror image of those assessed by the court on the Stones' breach of contract claim, the grant of summary judgment on the other asserted theories was improper and constituted error. The Stones were entitled to proceed to trial and judgment on its other claims and should not have been denied that opportunity merely because the court determined that the actual damages claimed on Counts II thru V would be overlapping. The Stones were entitled to proceed on as many theories of recovery as were appropriate under the law. The theories asserted were not inconsistent.

The breach of fiduciary duty claims arose out of a contractual relationship. It follows that if there has been a breach of fiduciary duty imposed by a contract, there necessarily has also been a breach of contract. Bad faith in the liability insurance context essentially involves proving that there was a fiduciary duty and that its breach was intentional, willful and dishonest. As in the case of the fiduciary duty claims, substantiating and proving a claim of bad faith necessarily would prove a breach of contract.

In Kincaid Enterprises, Inc. v. Porter, 812 S.W.2d 892 (Mo.App. W.D. 1991), the Court held that a claim for breach of contract, in addition to a claim for fraudulent inducement entitled a party to proceed to verdicts on each of those theories properly pled in the same action. (Kincaid at p. 900) The Court pointed out that the two claims were not inconsistent, although the measure of damages may have been comparable or overlapping.

The Missouri Supreme Court held in Whittom v. Alexander-Richardson, 851 S.W.3d 504 (Mo. 1993) that the election of remedies doctrine applies where a party has pursued one of two inconsistent remedies to final judgment. The Court further held that the election of remedies doctrine is to prevent double recovery for a single injury and that the doctrine is entirely distinct from that which requires a party to elect between theories of recovery that are inconsistent. The Stones did not assert any inconsistent theory. They have asserted different theories seeking to afford the same actual damage recovery. That does not preclude them from being submitted, and the court, in seeming to hold otherwise by its judgment, was in error.

The rule enunciated in the Whittom decision was reiterated in Ellsworth Breihan Bldg. Co. v. Teha, Inc., 48 S.W.3d 80 (Mo.App. E.D. 2001). In the Ellsworth case, the Court held that a final judgment must first be obtained on one of two inconsistent remedies before the doctrine of election of remedies can apply. Particularly, the Court stated at page 82 the following: "Thus, for the doctrine to apply, a party must have more than one remedy to correct a single wrong and those remedies must be inconsistent."

The Missouri Supreme Court has recently made abundantly clear that there is a viable and sharp distinction between the doctrine of election of remedies and election of inconsistent theories of recovery. In Trimble v. Pracna, 167 S.W.3d 706 (Mo. 2005), the Missouri Supreme Court followed its prior 1993 decision in the Whittom case, and addressed, and distinguished the doctrine, and held specifically that multiple theories of recovery are inconsistent only if, under all of the circumstances, one theory of recovery factually disproves the other. The Stones did not have before the trial court any theory of recovery which factually disproved the other. It is clear from the rulings of the Missouri Supreme Court that it was error for the court to dismiss or dispose of the other claims asserted by the Stones on the basis of any assertion by Farm Bureau that there was an election of remedies made by reason of the Stones' motion for partial summary judgment, or on the basis of the doctrine of inconsistent theories of recovery.

In addition, the Missouri Supreme Court in Scott v. Blue Springs Ford Sales, Inc., 176 S.W.3d 140 (Mo. 2005), followings its rulings in the Trimble v. Pracna and Whittom cases also confirmed that it is error for a trial court to refuse to submit to a jury a claim for punitive damages asserted on the basis of one theory of recovery, when punitive damages could be recovered on another, but not inconsistent theory of recovery.

The judgment of the trial court seems to grant Farm Bureau's motion for summary judgment on Counts II thru V, not because Farm Bureau had substantiated a right to summary judgment on those claims, but merely because the court somehow considered them to be overlapping or duplicative in the amount of actual damages which might be obtained and therefore, improper to pursue after the court had granted summary judgment on the breach of contract claim in favor of the Stones. Assuming the understanding of the trial court's judgment as expressed herein is correct, it was improper. The court was in error in dismissing Count VI, the claim for exemplary or punitive damages. Submission and recovery on Counts II, III, IV, or V would have entitled plaintiffs to proceed with efforts to submit the exemplary or punitive damage claim for determination by a trier of fact. Recovery on those counts may have warranted assessment of additional damages designed for the purpose of making an example of Farm Bureau, and deterring it and others from like wrongful conduct in the future.

In the case of Vogt v. Hayes, 54 S.W.3d 207 (Mo.App. S.D. 2001), the court concluded that remand of a case was proper for consideration of damages for a claim asserted for fraudulent inducement to make a contract. Plaintiffs in the underlying suit had already obtained recovery and damage assessment for an alternative theory asserted, i.e., breach of contract. In holding consistent with the Kincaid Enterprises case, the court stated, at page 211 the following: "The Vogts are entitled to be made whole by one compensatory damage award, but not to the windfall of a double recovery. If the proven damages for both the breach of contract and for the tort are the same, then the damage award merges."

The trial court should have followed the law on alternative pleading and submission of multiple theories of recovery. The Stones were entitled to determination of the actual damages on Counts II, III, IV, or V and, having those actual damage amounts merged in a judgment, as they would likely have been wholly overlapping of the actual damages assessed by the court in its grant of pre-trial summary judgment on Count I, breach of contract.

Recovery on any one of the tort theories (Counts II thru V) would allow the possibility of having additional damages assessed in the form of exemplary or punitive damages. The counts sought similar relief in recovery of actual damages as asserted in Count I, but were not the same. The Stones were entitled to proceed on their other theories of recovery asserted in Counts II thru V and have a verdict rendered on them. The trial court's grant of summary judgment on those claims merely because it believed that they were duplicative or involved assessment of overlapping damages was improper. The Missouri Supreme Court opinions in Trimble v. Pracna, 167 S.W.3d 706 (Mo. 2005) and Scott v. Blue Springs Ford Sales, Inc., 140 S.W.3d 176 (Mo. 2005) have made the law abundantly clear and the error of the trial court obvious.

Conclusion

Albert J. Stone and Tammy Stone, Plaintiffs-Appellants, respectfully submit to the Court that the trial court erred in granting summary judgment on Counts II thru VI of plaintiffs' Amended Petition for the reasons set forth herein above. The Stones request the Missouri Supreme Court to reverse that part of the judgment of the trial court granting summary judgment in favor of Farm Bureau on the Stones' claims asserted within Counts II thru VI of its Amended Petition, and remand the case to the trial court for further proceedings and trial on those claims.

____

Thomas W. Millington, MBN 35326
Millington, Glass & Love
1736 East Sunshine, Suite 405
Springfield, Missouri 65804
Telephone: 417/883-6566
Facsimile: 417/883-6689

ATTORNEYS FOR THE STONES
APPELLANTS/CROSS-RESPONDENTS

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count function of Microsoft Word, by which it was prepared, contains 15,374 words, exclusive of the cover, the Certificate of Service, this Certificate of Compliance, the signature block and the appendix.

The undersigned further certifies that the diskette filed herewith containing this Appellant's brief in electronic form complies with Missouri Supreme Court Rule 84.06(g) because it has been scanned for viruses and is virus-free.

Thomas W. Millington, MBN 35326
Millington, Glass & Love
1736 East Sunshine, Suite 405
Springfield, Missouri 65804
Telephone: 417/883-6566
Facsimile: 417/883-6689

ATTORNEYS FOR THE STONES
APPELLANTS/CROSS-RESPONDENTS

Certificate of Service

The undersigned hereby certifies that on the 14th day of March, 2006, one original and ten true and correct copies of the foregoing brief; separately bound appendix to the brief and one diskette containing a copy of the brief were sent to the court as required by Rule 84.06(f) and two copies of the brief and appendix and diskette containing a copy of the brief were forwarded to Mr. Joseph P. Winget, P.O. Box 4043, Springfield, Missouri, 65808-4043,via:

☐	United States Mail	☐	Facsimile transfer to counsel
☐	Overnight Mail	☐	Hand delivery to courthouse
☐	Certified Mail	☐	Hand delivery to counsel

____

Thomas W. Millington