

**COPY**

**SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

---

NO. 2003-CA-00241

---

**FILED**

**SEP 16 2003**

OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS

**THELMA R. BYRD**

**PLAINTIFF/ APPELLANT**

**VERSUS**

**MARY BYRD ELLIS, DAVID R.  
HUTCHINSON, and NATIONWIDE GENERAL INSURANCE  
COMPANY**

**PLAINTIFF/ APPELLEES**

---

**APPEAL FROM THE CIRCUIT COURT  
OF JACKSON COUNTY, MISSISSIPPI**

---

**BRIEF OF APPELLEE, NATIONWIDE GENERAL INSURANCE COMPANY**

---

**ORAL ARGUMENT REQUESTED**

---

ROGER T. CLARK (6276)  
KIMBERLY S. ROSETTI (99394)  
**BRYANT, CLARK, DUKES, BLAKESLEE,  
RAMSAY & HAMMOND, P.L.L.C.**  
Post Office Box 10  
Gulfport, MS 39502-0010  
Telephone: (228) 863-6101  
Fax: (228) 868-9077

**IN THE SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**CAUSE NO. 2003-CA-00241**

**THELMA R. BYRD**

**PLAINTIFF/APPELLANT**

**VERSUS**

**MARY BYRD ELLIS, DAVID S.**

**HUTCHINSON and NATIONWIDE GENERAL INSURANCE  
COMPANY**

**DEFENDANTS/ APPELLEES**

**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel for NATIONWIDE GENERAL INSURANCE COMPANY certifies the following parties have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Thelma R. Byrd - Plaintiff/ Appellant
2. Lee E. Young, Esq. (MSB # 9061) - Counsel for Plaintiff/ Appellant
3. Nationwide General Insurance Company - Defendant/ Appellee
4. Roger T. Clark (MSB #6276) and Kimberly S. Rosetti (MSB #99394) of Bryant, Clark, Dukes, Blakeslee, Ramsay & Hammond, P.L.L.C. - Counsel for Defendant/Appellee Nationwide General Insurance Company
5. Mary Byrd Ellis - Defendant/ Appellee
6. Floyd G. Hewitt, Esq. (MSB #2415) of Compton, Crowell and Hewitt, P.L.L.C. - Counsel for Defendant/ Appellee Mary Byrd Ellis
7. David S. Hutchinson - Defendant/ Appellee
8. G. Charles Bordis, Esq. (MSB #3695) of Sadler, Ranson & Bordis - Counsel for Defendant/ Appellee David S. Hutchinson
9. H. Benjamin Mullen, Esq. (MSB # 9077) of Bryan, Nelson, Schroeder, Castigliola & Banahan - Counsel for Defendant/ Appellee David S. Hutchinson

10. W. Harvey Barton (MSB #2104) and Skip Edward Lynch (MSB #10460) of Law Offices of W. Harvey Barton - Counsel for Andrew S. Odom (claimant from a Consolidated litigation).

  
KIMBERLY S. ROSETTI (MSB #99394)

ROGER T. CLARK (MSB # 6276)  
KIMBERLY S. ROSETTI (MSB 99394)  
**BRYANT, CLARK, DUKES, BLAKESLEE,**  
**RAMSAY & HAMMOND, P.L.L.C.**  
2223 14th Street  
Post Office Box 10  
Gulfport, MS 39502

## **TABLE OF CONTENTS**

Certificate of Interested Persons .....	i, ii
Table of Contents .....	iii
Table of Authorities .....	iv
Statement of Issues Presented for Review .....	1
Statement of the Case .....	2
(I)    Nature of the Case .....	2
(II)   Course of Proceedings and Disposition in Court Below .....	2
(III)  State of the Facts .....	3
Summary of the Argument .....	4,5
Standard of Review .....	6
Argument .....	6
I.     Whether the Circuit Court prematurely entered Summary Judgment upon disputed material facts .....	6-8
II.    Whether Ms. Byrd qualified the Ellis vehicle as underinsured and whether multiple claims for bodily injury proceeds of the same insurance policy are considered in qualifying the Ellis vehicle as Underinsured	
A.    Precedence supporting limits versus limits analysis to meet requirements for uninsured/ underinsured motorist status. ....	8-12
B.    Amount of Ms. Byrd's damages and limits "actually available" under the bodily injury limits of the Nationwide policy due to multiple claimants are irrelevant to determine eligibility for uninsured/underinsured motorist benefits. ....	12,13
Conclusion .....	13,14
Certificate of Filing .....	15

## **TABLE OF AUTHORITIES**

### **Page No(s).**

<u>Cossitt v. Federated Guaranty Mutual Ins. Co.</u> , 541 So. 2d 436 (Miss. 1989). . . . .	11,12,14
<u>Fidelity &amp; Guaranty v. Earnest</u> , 699 So. 2d 585 (Miss. 1997). . . . .	6,10,11,12
<u>Guardianship of Lacy v. Allstate Ins. Co.</u> , 649 So. 2d 195 (Miss. 1995). . . . .	13
<u>Hardy v. Brock</u> , 826 So. 2d 71,74 (Miss. 2002) . . . . .	6
<u>Herrod v. National Indemnity Co.</u> , 643 F.Supp. 956 (N.D. Miss. 1986). . . . .	12,13,14
<u>Knudson v. Grange Mutual Companies</u> , 507 N.E. 2d 1155 (Ohio 1986). . . . .	14
<u>McMinn v. New Hampshire Ins. Co.</u> , 276 So. 2d 682 (Miss. 1973). . . . .	12
<u>Richmond v. Benchmark Constr. Corp.</u> , 692 So. 2d 60,61 (Miss. 1997) . . . . .	6
<u>Sample v. Haga</u> , 824 So. 2d 627 (¶3)(Mississippi Ct. App. 2001) . . . . .	6
<u>St. Arnaud v. Allstate Ins. Co.</u> , 501 F.Supp. 192 (S.D. Miss. 1980). . . . .	12
<u>State Farm Mutual Automobile Ins. Co. v. Valencia</u> , 905 P.2d 202 (N.M. 1995). . . . .	14
<u>Thiac v. State Farm Automobile Ins. Co.</u> , 569 So. 2d 1219 (Miss. 1990). . . . .	6,9,10
<u>Washington v. Georgia American Ins. Co.</u> , 540 So. 2d 22 (Miss. 1989). . . . .	11,12
<u>Wilson v. Nationwide Mutual Ins. Co.</u> , 667 F.Supp. 349 (N.D. Miss. 1987). . . . .	13

## **RULES, STATUTES, AND OTHER AUTHORITIES**

Miss. Code Ann. § 83-11-103(c)(iii) . . . . .	9,10
Miss. Code Ann. § 83-11-101 . . . . .	9

## **STATEMENT OF THE ISSUES**

1. Whether the trial court prematurely entered summary judgment and whether disputed material facts exist.
2. Whether Ms. Byrd and the Ellis vehicle qualify as uninsured and/or underinsured and whether a multiple claim for liability proceeds of an insurance policy are considered in determining whether a vehicle is underinsured.
  - A. Precedence supporting limits versus limits analysis to meet requirements for uninsured/ underinsured motorist status.
  - B. Amount of Ms. Byrd's damages and limits "actually available" due to multiple claimants are irrelevant to determine eligibility for uninsured/ underinsured motorist benefits.

## **STATEMENT OF THE CASE**

### **(I) Nature of the Case**

The subject case involves an automobile collision involving three (3) automobiles. Plaintiff, Ms. Byrd, was a guest passenger in the vehicle driven by her daughter, Ms. Ellis. Ms. Ellis had insurance on her vehicle (hereinafter the "Ellis vehicle") through Nationwide General Insurance Company with limits of \$100,000.00 bodily injury per occurrence and \$50,000.00 uninsured motorist per occurrence. Ms. Byrd did not have uninsured motorist coverage of her own. Ms. Byrd was allegedly injured in the subject automobile accident along with two other claimants.

This appeal considers whether an Order granting Summary Judgment in favor of Nationwide General Insurance Company was appropriate on the basis that Ms. Byrd and the Ellis vehicle did not qualify as uninsured/ underinsured under Mississippi law.

### **(II) Course of Proceedings and Disposition in Court Below**

Ms. Byrd filed her First Amended Complaint on November 1, 2001 naming Nationwide General Insurance Company as one of the defendants and seeking relief under the uninsured motorist policy of Ms. Ellis, Ms. Byrd's daughter and driver of the vehicle. (R. 7-11). On or about December 11, 2001, Nationwide General Insurance Company filed its Separate Answer to the First Amended Complaint asserting as a defense that Ms. Byrd was not entitled to invoke the uninsured motorist provision of a policy of insurance issued to Ms. Ellis. (R. 12-18). Nationwide General Insurance Company filed its Motion for Summary Judgment on July 25, 2002. (R. 3-6). After a hearing on the Motion for Summary Judgment, the Court granted the Motion finding that under Mississippi law, the Ellis vehicle did not qualify as an underinsured vehicle and Ms. Byrd could not look to the Nationwide uninsured motorist policy for compensation for her injuries. (R. 53-54). Ms. Byrd has appealed the decision of the Circuit Court.

**(III) Statement of the Facts**

On November 28, 1998, Ms. Byrd was a guest passenger in a vehicle operated by her daughter, Ms. Ellis. Ms. Ellis' vehicle was involved in a collision with a vehicle operated by David Hutchinson. (R. 7-11). Ms. Byrd is claiming that the accident was caused by the negligence of Ms. Ellis and Mr. Hutchinson. (R. 8). Ms. Ellis had a Nationwide General Insurance Company policy of insurance including uninsured motorist coverage. (R. 4, 18-47). On November 28, 1998, Ms. Byrd did not have a personal automobile liability policy. (R., 3, 48). Allegedly, there are three persons making a claim for the bodily injury coverage under Ms. Ellis' policy. (T. 7-8). The Nationwide General Insurance policy includes bodily injury in the amount of \$100,000.00 per occurrence and uninsured motorist in the amount of \$50,000.00 per occurrence. (R. 4, 18-47).



### **SUMMARY OF THE ARGUMENT**

The Circuit Court was correct in granting Nationwide General Insurance Company's Motion for Summary Judgment in this case. After thoughtful consideration of the applicable case law and statutes pertaining to underinsured motorists, the Court found that the Ellis vehicle did not qualify as an underinsured vehicle and Ms. Byrd could not look to Nationwide's uninsured motorist policy on the Ellis vehicle to satisfy her injuries, if any, in this matter. There are no genuine issues of material fact which would prevent this issue of underinsured motorist coverage from being decided at this moment in time.

The extent of Ms. Byrd's injuries, if any, and the issue of multiple claimants pursuing bodily injury benefits under Ms. Ellis' policy does not have any bearing upon the issues presented in the Motion for Summary Judgment under Mississippi law. These issues are not relevant to the analysis for determining whether a vehicle qualifies as underinsured. Ms. Byrd presented no evidence of a genuine issue of material fact. In addition, Ms. Byrd did not present any case law in Mississippi in support of her argument that the issue of multiple claimants should factor into the qualification of the Ellis vehicle as an underinsured vehicle. Under Mississippi law, Ms. Byrd must first establish that the Ellis vehicle was, in fact, underinsured. To determine if a vehicle is underinsured, one must compare the limits of liability coverage on the Ellis vehicle to the uninsured limits applicable to Ms. Byrd. Therefore, although Ms. Byrd may qualify as an insured (guest passenger) under the Ellis uninsured motorist policy with a \$50,000.00 per occurrence limit for underinsured vehicles, the vehicle does not qualify when comparing \$50,000.00 under the Ellis uninsured policy to the \$100,000.00 available under the Ellis bodily injury provisions. A limits to limits analysis is the proper analysis under Mississippi law to determine qualification as an underinsured vehicle. The only avenue for a guest passenger to qualify the vehicle as an underinsured vehicle in a one vehicle accident (or when seeking bodily injury and uninsured motorist benefits under the same policy) is to have an uninsured motorist policy of her own. Therefore, based on these factors coupled with the applicable Mississippi case law, the trial court correctly granted Nationwide's Motion for Summary Judgment.

Ms. Byrd has claimed that Ms. Byrd and/or Mr. Hutchinson are responsible for the accident causing her injuries, if any. As argued to the Court, Nationwide's Motion for Summary Judgment is in essence a partial summary judgment motion due to the fact that the arguments presented against underinsured motorist coverage are applicable only if Ms. Ellis was the tortfeasor. (T. 4,10). The scenario would be different if Mr. Hutcherson was the tortfeasor. Therefore, a Motion for Summary Judgment was filed to protect Nationwide General Insurance Company should a jury find that Ms. Ellis was the tortfeasor and not Mr. Hutchinson. Nationwide General Insurance Company does not concede that Ms. Ellis was the tortfeasor in this automobile accident as asserted by Ms. Byrd in her Brief to this Court.

## **STANDARD OF REVIEW**

The review of an Order granting summary judgment by this Court is *de novo*. All evidence is viewed in the light most favorable to the non-moving party. Sample v. Haga, 824 So. 2d 627 (¶ 3) (Miss. Ct. App. 2001)(citations omitted). "The burden is placed on the moving party to show that no genuine issue of material fact exists. A material fact is a factual issue 'that matters in an outcome determinative sense.' All questions of law are reviewed *de novo*. Sample, 824 So. 2d 627 (¶ 3)(Miss. Ct. App. 2001)(citations omitted). "The non-moving party may not rest upon allegations or denials in the pleadings but must set forth specific facts showing that there exists genuine issues for trial." Hardy v. Brock, 826 So. 2d 71, 74 (Miss. 2002)(citing Richmond v. Benchmark Constr. Corp., 692 So. 2d 60, 61 (Miss. 1997)).

## **ARGUMENT**

### **I. WHETHER THE CIRCUIT COURT PREMATURELY ENTERED SUMMARY JUDGMENT UPON DISPUTED MATERIAL FACTS**

The issues before the Court in the subject Motion for Summary Judgment are mostly questions of law. (R. 3-6 ). The only material facts, according to Mississippi case law, which are essential to a determination of whether the Ellis vehicle qualifies as an underinsured vehicle are the limits of bodily injury on the Ellis vehicle, limits of uninsured motorist of the Ellis vehicle and the limits of personal uninsured motorist held by Ms. Byrd. See Thiach v. State Farm Automobile Ins. Co., 569 So. 2d 1217 (Miss. 1990); Fidelity and Guaranty v. Earnest, 699 So. 2d 585, 587 (Miss. 1997). There are no genuine issues of material fact on these facts. The limits of the Ellis policy for both bodily injury and uninsured motorist are contained in the Nationwide General Insurance Company attached as an exhibit to the Motion for Summary Judgment. (R. 3-6, 18-47 ). There was no dispute as to the limits contained within the Nationwide policy for the Ellis vehicle. In addition, an affidavit was signed by Ms. Byrd and submitted as an exhibit to the Motion for Summary Judgment indicating that Ms. Byrd did not have a personal automobile policy at the time of the accident. (R. 48 ). Under Mississippi law as further discussed below, the issue of available insurance proceeds to satisfy a recovery of Ms. Byrd when multiple

claimants are seeking recovery under the same bodily injury limits is not a necessary fact under Mississippi law to determine whether the Ellis vehicle qualifies as an underinsured vehicle.

The sum, if any, that Ms. Byrd or any other claimant may receive under the Nationwide bodily injury limits for the Ellis vehicle is not relevant to whether the Ellis vehicle qualifies as an underinsured vehicle and whether Ms. Byrd may recover under the uninsured motorist provisions. The fact of other claimants ability to qualify the Ellis vehicle as an underinsured vehicle is not relevant to the exact issue presented in the Motion for Summary Judgment which is specifically focused upon the claims of Ms. Byrd for underinsured motorist benefits under the Ellis insurance policy through Nationwide if Ms. Ellis was found to be the tortfeasor by a jury. (R. 3-6, T. 10). Ms. Byrd must first qualify the Ellis vehicle as underinsured before the amount of recovery can be determined under the uninsured motorist policy.

Nationwide did not concede that Ms. Ellis proximately caused the automobile accident as argued by Ms. Byrd in her Brief to this Court. The Motion for Summary Judgment was argued as a partial summary judgment because it hinges upon Ms. Ellis being found to be the tortfeasor responsible for the subject accident by a jury. (T. 10). The scenario and arguments of Nationwide would be different if Mr. Hutchinson were found to be the tortfeasor to the exclusion of any fault of Ms. Ellis. (T. 10). The Motion was filed by Nationwide to request a determination on the issue of whether the Ellis vehicle was underinsured for purposes of Ms. Byrd's claim against the uninsured motorist provision of the Ellis policy. (R. 3-6, T. 1-5, 10-11).

Nationwide did not concede the value of Ms. Byrd's claim or that it exceeded any amount which Ms. Byrd might recover under the bodily injury provisions of the Ellis policy through Nationwide. The value of Ms. Byrd's claim and any amount Ms. Byrd may recover under the bodily injury provisions are not material facts and not necessary for a determination of the issues presented in the Motion, i.e. whether Ms. Byrd can qualify the Ellis vehicle as an underinsured

vehicle. Therefore, there was no genuine issue of material fact which would prevent the Circuit Court from granting the Motion for Summary Judgment. The lack of a genuine issue of material fact is supported by the arguments below and case law which address the "limits versus limits" analysis.

**II. WHETHER MS. BYRD QUALIFIED THE ELLIS VEHICLE AS UNDERINSURED AND WHETHER MULTIPLE CLAIMS FOR BODILY INJURY PROCEEDS OF THE SAME INSURANCE POLICY ARE CONSIDERED IN QUALIFYING THE ELLIS VEHICLE AS UNDERINSURED**

**A. Precedence supporting limits versus limits analysis to meet requirements for uninsured/ underinsured motorist status.**

The issue of multiple claimants seeking recovery under bodily injury limits and utilizing that projected amount of recovery to qualify a vehicle as underinsured is not a matter of first impression for the courts in Mississippi. As the Circuit Court correctly determined, Ms. Byrd cannot qualify the Ellis vehicle insured through Nationwide as an underinsured vehicle. (R. 53-54). Nationwide General Insurance Company insured the Ellis vehicle for \$100,000.00 in bodily injury and \$50,000.00 in uninsured motorist benefits. (R. 3-6, 18-47, T. 5 ). Ms. Byrd did not have her own personal automobile insurance. (R. 48).

For purposes of the issues presented in this appeal, it is important to note that Ms. Byrd is attempting to claim bodily injury benefits and uninsured motorist benefits under the same Nationwide policy insuring the Ellis vehicle. Therefore, this matter is similar to a one vehicle accident wherein one insurance policy is applicable. This is important because the uninsured motorist statute specifically limits the amount of uninsured motorist coverage as compared to bodily injury limits which can be written in one insurance policy, as discussed in detail below. See Thiach v. State Farm Automobile Ins. Co., 569 So. 2d 1217, 1220 (Miss. 1990)(citing Miss. Code Ann. § 83-11-103(c)(iii)). Another important fact to note is that Nationwide argued this Motion should Ms. Ellis eventually be determined the tortfeasor by a jury. (T. 4,10). The arguments to the Circuit Court focused solely upon a determination of whether the vehicle was qualified an underinsured should Ms. Ellis later be found negligent by a jury. (T.10).

The controlling case on this issue is Thiac v. State Farm Automobile Ins. Co., 569 So. 2d 1217 (Miss. 1990). The Thiac case involves a one vehicle accident wherein the Plaintiff demanded underinsured motorist benefits under a policy for an uninvolved vehicle. Thiac, 569 So. 2d at 1218. The vehicle had \$25,000.00 in bodily injury limits and \$25,000.00 in uninsured motorist benefits. Id. at 1218. Similar to the instant case, the Plaintiff did not have personal automobile insurance of her own. Id.

The Supreme Court stated that a “plaintiff must initially establish that the insured motor vehicle was, in fact, underinsured.” Id. at 1219. The Supreme Court analyzed prior case law along with Miss. Code Ann. § 83-11-101 and found that “implicit in this notion of an underinsured motorist is the notion that the injured person has taken some steps to protect oneself and is entitled to utilize the protection which one has secured.” Id. at 1219. The Supreme Court specifically held that “in determining whether an insured vehicle is underinsured, we have compared the *limits* of liability coverage on that vehicle to the uninsured *limits* provided through the injured party’s own coverage.” Id. (Emphasis added) (citations omitted). The Supreme Court analyzed prohibitions against issuance of uninsured motorist coverage in an amount greater than the liability coverage provided for in the policy and found that:

... it follows, in one-vehicle accidents, that unless *the injured person*, as referred to in § 83-11-103(c)(iii), is allowed to stack *his uninsured motorist coverage* with the coverage on the *insured motor vehicle*, the *insured motor vehicle* will never be un[der]insured because the uninsured motorist limits on *such vehicle* will never exceed its liability limits.

Id. at 1220. The Supreme Court found that Thiac, as an individual without insurance coverage of her own, could not qualify the tortfeasor with \$25,000.00 in liability limits as underinsured. Id.

In the instant case, Ms. Byrd did not have any uninsured motorist coverage of her own to stack with the \$50,000.00 in uninsured motorist coverage as a guest passenger in the Ellis vehicle. Therefore, with the Nationwide policy on the Ellis vehicle providing \$100,000.00 of liability limits on the Ellis vehicle as compared to \$50,000.00 (as guest passenger) on the Ellis vehicle, Ms. Byrd cannot qualify the Ellis vehicle as an underinsured vehicle because Ms. Byrd does not have any personal automobile insurance of her own.

As argued to the Circuit Court in the hearing for Motion for Summary Judgment, a case cited by Ms. Byrd in her response to the Motion follows the analysis in the Thiac case, but specifically involves multiple claimants in a one-vehicle accident. Fidelity and Guaranty v. Earnest, 699 So. 2d 585, 587 (Miss. 1997). (T. 11-14). Although Ms. Byrd's accident is not a one-vehicle accident, the relevant inquiry as to the Motion for Summary Judgment by Nationwide involves a situation if a jury was to find Ms. Ellis the tortfeasor thereby creating a one-vehicle accident situation because one insurance policy would be applicable. The actual issue in Earnest is the extent to which an uninsured motorist carrier may validly offset by amounts paid on behalf of the driver. Earnest, 699 So. 2d at 587. However, the case is important to the subject appeal since it addresses multiple claimants for a liability policy and qualifying the host vehicle as underinsured.

In Earnest, Tracy Earnest and two other passengers were killed in a one-vehicle accident. The vehicle was covered under a liability policy issued by Fidelity and Guaranty in the amount of \$50,000.00 bodily injury and \$25,000.00 uninsured. Id.(¶1). Tracy Earnest was the only passenger with automobile insurance of her own and the only passenger able to qualify the vehicle as an underinsured vehicle. Earnest had the following uninsured limits of her own plus the host vehicle: the \$25,000.00 on the host vehicle uninsured motorist policy and \$45,000.00 available on her uninsured motorist policy through State Farm. Id.(¶2). Therefore, Earnest was able to qualify the host vehicle as underinsured when comparing the limits of the liability coverage (\$50,000.00) to the limits of \$70,000.00 stacked in uninsured motorist limits.

The Supreme Court in Earnest stated that "in determining whether a tortfeasor is properly considered to be an uninsured motorist with regard to a particular UM insured, *limits* of the tortfeasor's liability insurance should be compared to the stacked total of UM benefits applicable to the UM insured." Id. at 589 (¶16). (Emphasis added) (citing Washington v. Georgia American Ins. Co., 540 So. 2d 22 (Miss. 1989); Cossitt v. Federated Guar. Mut. Ins. Co., 541 So. 2d 436 (Miss. 1989)). The Court specifically noted that the Supreme Court previously addressed the issue of this limits versus limits approach to qualifying as an underinsured vehicle in comparison

to the approach of comparing the stacked UM total to the amount “actually available” to the insured. The Supreme Court in Earnest followed the precedence of Washington and Cossitt and utilized the limits versus limits analysis because the approach of comparing the amount “actually available” was not supported by the ‘limits versus limits’ language found in the uninsured motorist statutes. Id. (T. 17,18)(Citations omitted).

In Earnest, there were two passengers who did not have automobile insurance and therefore no uninsured motorist coverage other than the uninsured motorist limits on the host vehicle. Therefore, the passengers other than Earnest were not able to qualify the host vehicle as underinsured. (\$50,000.00 liability limits compared to \$25,000.00 uninsured limits under host vehicle policy). Id. at 590. In a footnote, the Supreme Court noted the other two passengers did not meet the requirements to trigger underinsured motorist coverage because the only applicable limits for the two passengers was the \$25,000.00 under the host vehicle policy. The limits versus limits analysis applied even though the two passengers only received \$16,666.67 each in liability benefits. The Supreme Court followed the precedence of Washington and Cossitt . (Id. fn 3).

The Federal Courts in Mississippi have also followed precedence of the Mississippi Supreme Court and held that the limits of coverage govern the issue of whether a motorist is uninsured. Herrod v. National Indemnity Co., 643 F.Supp. 956, 960 (N.D. Miss. 1986). (citing McMinn v. New Hampshire Ins. Co., 276 So. 2d 682 (Miss. 1973)). The District Court cited St. Arnaud v. Allstate, 501 F.Supp. 192 (S.D. Miss. 1980) which involved multiple claimants recovering under a liability policy. In St. Arnaud, the District Court determined uninsured motorist status based upon the *limits* of the policies. Herrod, 643 F.Supp. at 960 (citing St. Arnaud, 501 F.Supp at 194)).

In Guardianship of Lacy v. Allstate Ins. Co., 649 So. 2d 195, 197 (Miss. 1995), the Supreme Court noted that the uninsured motorist statute defines underinsured vehicles in terms of limits of liability compared to limits applicable to the injured uninsured motorist coverage. The Lacy case was cited Ms. Byrd in her Brief to this Court. However, the Lacy case recognizes that the Statute does not address multiple parties. Id. at 197. Therefore, as in the instant



litigation, the statutory language does not support an analysis other than limits versus limits as discussed in the previous case law.

**B. Amount of Ms. Byrd's damages and limits "actually available" under the bodily injury limits of the Nationwide policy due to multiple claimants are irrelevant to determine eligibility for uninsured/ underinsured motorist benefits.**

The District Court for the Northern District of Mississippi relied upon Mississippi statutory law for the holding that the limits of liability contained in the tortfeasor's policy must be considered in determining a person's right to underinsured motorist benefits. Wilson v. Nationwide Mutual Ins. Co., 667 F.Supp. 349, 355 (N.D. Miss.)(citing Herrod v. National Indemnity Co., 643 F.Supp. 956 (N.D. Miss. 1986)). "Since Mississippi law defines an underinsured vehicle in terms of policy limits, as distinguished from proceeds actually received by a particular claimant, the court in Herrod refused to construe 'limits of liability' under all bodily injury liability insurance" as the amount actually received by the claimant." Wilson, 667 F. Supp. at 355 (citing Herrod, 643 F.Supp. at 956). In addition, the amount of damages of the claimant is also irrelevant to the determination of eligibility for uninsured motorist benefits. Id. at 355. "Uninsured motorist benefits are not recoverable unless the tortfeasor's bodily injury liability *limit* is less than the applicable *limit* of uninsured motorist coverage." Id. (Citing Herrod, supra) (emphasis added).

When reviewing the Herrod case, it is important to note that the District Court was careful to distinguish cases involving uninsured motorist statutes from other states as compared with the uninsured motorist statute of Mississippi. The District Court distinguished the uninsured motorist statute of Louisiana which was among the foreign jurisdiction cases cited by Ms. Byrd in her Brief to this Court. The District Court found that the Louisiana statute was distinguishable from the Mississippi statute because the Louisiana statutory language makes no reference to insurance limits. Herrod, 643 F.Supp at 959.

To distinguish other cases of foreign jurisdictions cited by Ms. Byrd in her Brief to this Court, it is important to note that the Ohio uninsured motorist statute in Knudson v. Grange Mutual Companies, 507 N.E. 2d 1155 (Ohio 1986), specifically relied upon legislative intent "to

require insurance companies to offer a type of underinsured motorist coverage which would provide coverage when the actual amounts available for payment to the victim under the tortfeasor's insurance coverage are less than the victim's underinsured motorist coverage limits." Knudson, 507 N.E. 2d at 1157-1158). The Ohio statute is distinguishable from the Mississippi statute which relies upon limits not "actual amounts available for payment".

The case of State Farm Mutual Automobile Ins. Co. v. Valencia, 905 P.2d 202, which was cited by Ms. Byrd in her Brief to this Court references the split of decisions on the issues of "limit versus limit" analysis and "actual amounts available" analysis. The New Mexico Court notes that Mississippi has decided this issue in Cossitt v. Federated Guar. Mut. Ins. Co., 541 So. 2d 436, 439-43 (Miss. 1989) by relying principally upon applicable state statutory provisions. Valencia, 905 P.2d at 664. Therefore, this issue has been decided by this Honorable Court in previous case law and the limits versus limits analysis is supported by case law and statutory language. The amount of damages, if any, sustained by Ms. Byrd and the amount of actual recovery under the bodily injury limits of the Nationwide policy for the Ellis vehicle are not factors in the limits versus limits analysis.

There is no ambiguity found within the language of the Nationwide policy. Further, there is no ambiguity in the Mississippi Uninsured Motorist Statute which has been interpreted by this Court to require limits versus limits analysis.

### **CONCLUSION**

The Circuit Court was correct in granting Nationwide's Motion for Summary Judgment in this case. After thoughtful consideration of the applicable case law and statutory law pertaining to uninsured motorist claims, the Court found that the Ellis vehicle did not meet the requirements of an underinsured vehicle for the claims of Ms. Byrd. The main basis for this ruling is the fact that Ms. Byrd did not have personal automobile insurance of her own to provide another layer of applicable uninsured motorist coverage. Under the Mississippi Uninsured Motorist Statute and case law interpreting same, the proper analysis for Ms. Byrd and the Ellis vehicle is to compare the liability limits of the Nationwide policy with the uninsured motorist

limits for Ms. Byrd which is the \$50,000.00 (due to guest passenger status) from the Nationwide policy of Ms. Ellis. Since Ms. Byrd does not have other uninsured motorist coverage available to her through a personal automobile policy, the \$100,000.00 liability limits of the Nationwide policy for the Ellis vehicle are not less than the \$50,000.00 uninsured motorist limits for the Ellis vehicle. Therefore, the Ellis vehicle does qualify as an underinsured vehicle. As supported by the case law previously discussed, the number of claimants pursuing the liability limits of \$100,000.00 from the Nationwide policy for the Ellis vehicle, the amount actually recovered, if any, by Ms. Byrd from the Nationwide policy and the amount of damages, if any, incurred by Ms. Byrd are not relevant to meeting the requirements of an underinsured vehicle. The analysis is simply "limits versus limits" which follows legislative intent and the case law interpreting the uninsured motorist statute.

The Motion for Summary Judgment was applicable only to a determination by a jury that Ms. Ellis was the tortfeasor. If Mr. Hutchinson is the tortfeasor, the limits analysis would be different. However, the Circuit Court Order was appropriate at this time to secure a determination of this issue should a jury determine that Ms. Ellis is the tortfeasor for the subject accident. There are no genuine issues of material fact which would preclude the Order granting summary judgment. Nationwide has met its burden of proof applicable to Motions for Summary Judgment. Based on these factors, coupled with the applicable case law from the prior Mississippi Supreme Court decisions, the Circuit Court correctly granted Nationwide's Motion for Summary Judgment.

RESPECTFULLY SUBMITTED this the 16th day of September, 2003.

NATIONWIDE GENERAL INSURANCE COMPANY,  
Appellee

BRYANT, CLARK, DUKES, BLAKESLEE,  
RAMSAY & HAMMOND, P.L.L.C.

BY: Kimberly S. Rosetti  
ROGER T. CLARK (MSB No. 6276)  
KIMBERLY S. ROSETTI (MSB No. 99394)

**CERTIFICATE**

I, KIMBERLY S. ROSETTI, of the law firm of Bryant, Clark, Dukes, Blakeslee, Ramsay & Hammond, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF APPELLEE, NATIONWIDE GENERAL INSURANCE COMPANY** to Lee Edward Young, Esquire, at his record mailing address of Post Office Drawer 700, Pascagoula, MS 39568-0700, Skip Edward Lynch, Esquire, at his record mailing address of 3007 Magnolia Street, Pascagoula, Mississippi 39567, Floyd G. Hewitt, Jr., Esquire, at his record mailing address of Post Office Drawer 1937, Biloxi, MS 39533-1937, G. Charles Bordis, Esquire at his record mailing address of Post Office box 848, Ocean Springs, MS 39564, H. Benjamin Mullen, Esquire, at his record mailing address of Post Office Drawer 1529, Pascagoula, MS 39568-1529 and to Honorable Kathy King Jackson at her mailing address of 19th Circuit Court District, Jackson County Courthouse, Post Office Box 998, Pascagoula, MS 39568-0998.

**SO CERTIFIED**, this the 16th day of September, 2003.

  
KIMBERLY S. ROSETTI

**ROGER T. CLARK, ESQUIRE**  
Mississippi Bar No. 6276  
**KIMBERLY S. ROSETTI, ESQUIRE**  
Mississippi Bar No. 99394  
**BRYANT, CLARK, DUKES, BLAKESLEE,**  
**RAMSAY & HAMMOND, P.L.L.C.**  
2223 14th Street  
Post Office Box 10  
Gulfport, Mississippi 39502  
(228) 863-6101  
(228) 868-9077 (FAX)