

COPY

IN THE SUPREME COURT OF MISSISSIPPI

DOCKET NUMBER: 2003-CA-00241

FILED

THELMA R. BYRD

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PLAINTIFF / APPELLANT

VERSUS

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SUPREME COURT
COURT OF APPEALS**

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

DEFENDANTS / APPELLEES

**ON APPEAL FROM
THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI
CIVIL ACTION NUMBER: CI-2001-363(1)**

REPLY BRIEF OF PLAINTIFF / APPELLANT

Oral Argument Requested

**Lee Edward Young (MSB #9061)
Young Law Firm, P.C.
Suite One
1407 Jackson Avenue
Post Office Drawer 700
Pascagoula, MS 39568-0700
(228) 769-8840 / fax (228) 769-8868
Attorney for Plaintiff / Appellant**

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Attorney for Plaintiff / Appellant**

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Mississippi
None

United States

None

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STATEMENT OF ISSUES

PROPOSITION 1

THE CIRCUIT COURT PREMATURELY ENTERED SUMMARY JUDGMENT UPON
DISPUTED MATERIAL FACTS

PROPOSITION 2

WHERE MULTIPLE PARTIES CLAIM LIABILITY INSURANCE PROCEEDS OF
A SINGLE POLICY (I.E. WITHOUT "STACKING" BENEFITS), THE
"LIMIT" OF LIABILITY INSURANCE TO QUALIFY FOR UNDERINSURED
MOTORIST BENEFITS IS THE AMOUNT OF LIABILITY INSURANCE
PROCEEDS RECEIVED.

THE MEANING OF SECTION 83-11-103(C)(iii) MISSISSIPPI CODE
1972 IN A MULTIPLE CLAIMANT SITUATION IS NOT SELF-EVIDENT. THIS
IS A QUESTION OF FIRST IMPRESSION.

CONCLUSION

THIS HONORABLE COURT SHOULD REVERSE THE SUMMARY JUDGMENT AND
REMAND THIS MATTER FOR TRIAL ON THE MERITS.

ARGUMENT
(Brief of Appellant pp. 16-33)

Introduction

Defendants / Appellees Mary Byrd Ellis and David S. Hutchinson elected not to respond to Brief for Appellant. Only Defendant / Appellee Nationwide General Insurance Company responded by Brief for Appellee.

PROPOSITION 1
THE CIRCUIT COURT PREMATURELY ENTERED SUMMARY JUDGMENT
UPON DISPUTED MATERIAL FACTS
(Brief of Appellant pp. 18-21)

The learned trial court erred in granting summary judgment before the prerequisite findings and facts (conditions precedent to uninsured / underinsured motorist coverage) could be adjudicated (determined); i.e. premature consideration of summary judgment. Nationwide acknowledged that the prerequisite findings and facts remained undetermined:

* * *. Another important fact to not 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).
(Brief of Appellee p.8).

Nationwide took the novel position that Nationwide was entitled to summary judgment upon uninsured / underinsured motorist coverage although material facts could not be determined without trial on the merits. Nationwide did not meet its burden of proof

and/or persuasion. Nationwide was not entitled to judgment as a matter of law. In light of unresolved issues of material fact, the learned Circuit Court erred in granting summary judgment. This Honorable Court should reverse the summary judgment and remand for trial upon the merits.

Issues of Fact and Summary Judgment

The parties acknowledge that, on motion for summary judgment, all evidence must be viewed in the light most favorable to the non-moving party, here Plaintiff Byrd (Brief of Appellant p.21; Brief of Appellee p.6).

The trial court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried (Brief for Appellant pp.28-29). The learned Circuit Court ought to have held Defendant Nationwide's motion in abeyance until the material facts were resolved (Brief for Appellant pp.18, 20).

Disputed Material Facts

It is beyond cavil that the liability of any motor vehicle operator (driver) and the amount of motor vehicle liability insurance proceeds actually available to Plaintiff Byrd were unresolved issues of material fact (Brief for Appellant p.18). At issue are the actions of multiple vehicles, three (3) vehicles (Brief of Appellee p.2) as well as multiple claims of competing claimants (Brief for Appellant p.22).

As prerequisite "material" facts, Plaintiff / Appellant Byrd opined that:

Under the circumstances of this case, Defendant Nationwide General Insurance Company necessarily conceded that:

- (1) That Defendant Nationwide General Insurance Company's insured, Defendant Mary Byrd Ellis, proximately cause the motor vehicle collision, and
- (2) That Defendant Mary Byrd Ellis was legally responsible to pay damages to Plaintiff Thelma R. Byrd, and
- (3) That the dollar value of Plaintiff Thelma R. Byrd's injuries exceeded any sum that Plaintiff Thelma R. Byrd was likely to recover under Defendant Nationwide General Insurance Company's motor vehicle liability insurance.

If Defendant Nationwide General Insurance Company denied any of these issues, then Nationwide should have awaited determination of the prerequisite issues before moving for summary judgment for underinsured motorist coverage.

(Brief for Appellant p.19).

If Defendant Ellis and/or Hutchinson is adjudged not liable to Plaintiff Byrd, then Ellis' uninsured motorist coverage is inapplicable. If Defendant Ellis and/or Defendant Hutchinson is adjudged liable to Byrd, but Byrd's damages are satisfied by applicable liability insurance coverage; then Ellis' uninsured / underinsured motorist coverage is not "triggered" (T.7, 9, 10, 12; Brief for Appellant pp.4, 5).

Nationwide emphatically denied any concession of prerequisite, material facts:

Nationwide did not concede that Ms. Ellis proximately caused the automobile accident as argued by Ms. Byrd in her Brief to this Court. * * *. 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). * * *.

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.

* * *

(Brief of Appellee Nationwide pp.7-8).

Thus, disputed issues of material fact remained. Nationwide did not deny that the elements listed were prerequisites to uninsured / underinsured motorist insurance. Nationwide merely denied concession of any prerequisite ("trigger") issues.

Internal Inconsistency

Nationwide's reasoning is equivocal and internally inconsistent. On one hand, Nationwide is unwilling to concede conditions precedent to invocation of uninsured / underinsured motorist coverage (Brief of Appellee pp.7-8). On the other hand, Nationwide demanded that the learned Circuit Court grant pretrial judgment, i.e. before the prerequisite facts (conditions precedent) to uninsured / underinsured motorist coverage could have been adjudicated (determined) so as to "qualify the Ellis vehicle as an underinsured vehicle" (Brief of Appellee pp.2, 8).

Since only trial on the merits can resolve these disputed issues of material facts, then it was impossible for Plaintiff to resolve these material facts before trial on the merits. Nationwide demands the thoroughly impracticable. Neither the laws of Mississippi law nor the Mississippi Constitution require either the impossible or the thoroughly impracticable. State v.

Allstate Insurance Company, 97 So.2d 372, 376 (Miss. 1957); Smith v. Dorsey, 530 So.2d 5, 10 (Miss. 1988); Boyd v. Coleman, 146 Miss. 449, 111 So. 600, 604 (1927).

Nationwide can not "have it both ways." Watson v. City of Pascagoula, 577 So.2d 1234, 1236 (Miss. 1991) [discharged police officer sued city because city denied pre-termination hearing offered by city manager -- "The City cannot have it both ways, and is estopped from denying him a pre-termination hearing."]; Estate of Patterson v. Patterson, 798 So.2d 347, 349 (Miss. 2001) [where unwed father did not acknowledge boy as his son during boy's life, then father not entitled to inherit from boy as heir-at-law or as wrongful death beneficiary].

Here, Nationwide ought not to be permitted to rely upon its insurance contract provisions and/or Mississippi uninsured / underinsured motorist statutes when the insurance contract or statute works to Nationwide's advantage (i.e. conditions precedent to invoke uninsured / underinsured motorist coverage) and then to repudiate the same insurance contract or the same statute when they work to Nationwide's disadvantage (i.e. to permit Plaintiff trial on the merits to resolve disputed facts to "triggering" consideration of uninsured / underinsured motorist coverage).

In Hughes Masonry Company, Inc. v. Greater Clark County School Building Corporation, 659 F.2d 836, 838-839 (7th Cir. Ind. 1981) [construction manager was equitably estopped from repudiating arbitration clause of agreement], the U.S. Court of Appeals noted:

Hughes has characterized its claims against J. A. as sounding in tort, i.e. intentional and negligent interference with contract. In substance, however, Hughes is attempting to hold J. A. to the terms of the Hughes-Clark agreement. * * *. Therefore, we believe it would be [839] manifestly inequitable to permit Hughes to both claim that J. A. is liable to Hughes for its failure to perform the contractual duties described in the Hughes-Clark agreement and at the same time deny that J. A. is a party to that agreement in order to avoid arbitration of claims clearly within the ambit of the arbitration clause. "In short, [plaintiff] cannot have it both ways. [It] cannot rely on the contract when it works to its advantage, and repudiate it when it works to [its] disadvantage." Tepper Realty Co. v. Mosaic Tile Co., 259 F.Supp. 688, 692 (S.D. N.Y. 1966). See also Avila Group, Inc. v. Norma J. of California, 426 F.Supp. 537, 540 (S.D. N.Y. 1977) ("To allow [defendant] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.").

([bracketed] page number supplied, bold emphasis supplied).
[659 F.2d 838-839].

Absent determination of prerequisite, material facts, then

- (1) Nationwide failed to meet its burden of persuasion (Brief for Appellant p.20) and
- (2) the learned Circuit Court prematurely considered uninsured / underinsured motorist insurance coverage (Brief of Appellant pp. 18-21).

This Honorable Court should reverse the summary judgment and remand for trial upon the merits.

PROPOSITION 2
NATIONWIDE WAS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW
(Brief of Appellant pp. 22-32)

The learned Circuit Court erroneously construed Mississippi law. A trial court's findings are not entitled to deference when the findings are dependent upon a misapplication of law and are internally inconsistent. Gray v. Mississippi, 481 U.S. 648, 661 fn.10, 107 S.Ct. 2045, 2053 fn.10, 95 L.Ed.2d 622 (Miss. 1987) [capital murder prosecution].

In State Farm Mutual Automobile Insurance Co. v. Nester, 459 So.2d 787, 793 (Miss. 1984) [motor vehicle owner injured while riding as passenger in her own car], the Supreme Court restated its policy in construing uninsured motorist coverage:

Numerous decisions of this court have held that the uninsured motorist statute is to be liberally construed so as to provide coverage, and exceptions from coverage are to be strictly construed. (citation of collected Mississippi cases omitted). [459 So.2d at 790].

The Nester court then quoted Hodges v. Canal Insurance Co., 223 So.2d 630 (Miss. 1969), stating:

* * *. Speaking for the Court, Justice Gillespie wrote that in determining whether uninsured motorist coverage is available, one must view the matter from the perspective of the injured insured.

* * *

* * *. This provision must be construed from the perspective of the injured insured, from whose standpoint a tort-feasor operating an automobile with no insurance is an uninsured motorist. It is all the same to him whether there is no insurance at all, or a policy that is incapable of being applied to satisfy his claim because the tort-

feisor's insurer lawfully disclaims liability.
(Emphasis Added).
223 So.2d at 663, 634.
(Emphasis original). [459 So.2d at 790].

The Nester Court later considered interpretations of uninsured motorist coverage as:

* * *, noted insurance commentator Appleman has written: "It almost resembles Amos and Andy's definition of an insurance policy as a paper where "the big print gives it to you, and the little print takes it away." Insurance Law and Practice by Appleman, §5080.35. Appleman has also written as follows:

It has properly been stated that uninsured motorist protection is not coverage for vehicles but for persons, even though it is contained in a policy otherwise insuring an automobile and that it would be unconscionable to permit an insurer to collect premiums on the one hand and remove protection with the other by redefining "insured" under the UM coverages. If an automobile cannot be insured for the purpose of liability coverages and uninsured for UM coverage, the insurer cannot exclude from UM coverage a class of persons required to be included under the liability section.

Appleman, at §5080.
(**Bold** emphasis supplied). [459 So.2d at 793].

Consistent with Nester and Hodges, the learned Circuit Court ruled that the Court was required to judge the matter from the "perspective" (standpoint) of the insured:

* * *. The Mississippi Supreme Court has "consistently construed our uninsured motorist statute from the perspective of the insured." Fidelity & Guaranty Underwriters, Inc. v. Earnest, 699 So.2d 585, 591 (Miss. 1997); * * *
(Brief of Appellant p.6; Brief of Appellee).

Construed from the injured insured's (Plaintiff Byrd's) standpoint as Nester and Hodges and Earnest command, then the liability insurance proceeds actually received by the injured insured ought to be compared against a policy's uninsured motorist policy limitations.

As a question of first impression (Brief for Appellant p.22-23). Plaintiff urges this Honorable Court to adopt a comparison of available coverage ("real world" coverage) as the "limit" of coverage to be applied in Section 83-11-101 Mississippi Code 1972 and Section 83-11-103 Mississippi Code 1972 (Brief of Appellant pp.28-32). The statutes do not address application to multiple parties. Guardianship of Lacy v. Allstate Insurance Co., 649 So.2d 195, 197 (Miss. 1995) (en banc).

Nationwide Demands the Impossible / Impracticable

Nationwide's analysis is unreasonable because it requires anyone who does not own a motor vehicle (and thus can not obtain motor vehicle liability insurance) to remain dependant upon the vagaries of a "limits v. limits" comparison (see below). Since a passenger (Plaintiff Byrd) who owns no vehicle (R.48; Brief of Appellee p.8) can not purchase uninsured motorist coverage because she has no vehicle, then a passenger (Plaintiff Byrd) injured by an uninsured / underinsured motorist (Ellis?) remains at the mercy of the unforeseeable circumstances (multiple claimants?) of an unforeseeable motor vehicle accident (multiple vehicles?) (Brief of Appellant pp.26-27; Brief of Appellee p.8). Plaintiff Byrd can not fairly be subjected to circumstances resembling "You bet your life" or "Russian roulette."

Contrary to Nester, Hodges, and Earnest, Nationwide urges a simplistic, mechanical comparison of the declarations pages of insurance policies (if more than one policy applies), as opposed

to construing coverage from the injured insured's standpoint:

* * *. 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 uninsured motorist vehicle and whether Ms. Byrd may recover under the uninsured motorist provisions. * * *.

(Emphasis supplied). [Brief of Appellee pp.6-7].

Plaintiff Byrd

Plaintiff Byrd was born February 6, 1918 and was aged eighty (80) years on the date of the accident (CP.49; T.3; Brief for Appellant p.7). Plaintiff Byrd owned no vehicle (R.48; Brief of Appellee p.8).

No one who does not own a motor vehicle can purchase motor vehicle liability insurance coverage and/or uninsured motorist insurance coverage. Why? Motor vehicle liability insurance insures a specified motor vehicle. Nationwide's analysis unreasonably presumes that the injured passenger could have purchased greater uninsured motorist insurance. Appellee quoted the unfortunate premise of Thiac v. State Farm Mutual Automobile Insurance Co., 569 So.2d 1217, 1219 (Miss. 1990)

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." * * *.
(Brief of Appellee p.9)

Nationwide and Thiac presume that uninsured / underinsured motorist insurance is available the injured insured (victim). The presumption of fact is false because it presumes yet another fact (that the injured insured (victim) owns a motor vehicle and could thereby secure the protection of motor vehicle insurance).

Adopting Nationwide's view, the benevolent purposes of the uninsured motorist coverage would be frustrated. State Farm Mutual Automobile Insurance Co. v. Nester, 459 So.2d 787, 790 (Miss. 1984); Brief for Appellant p.24.

CONCLUSION
(Brief of Appellant pp. 32-33)

The learned Circuit Court Judge erred in prematurely granting summary judgment while disputed material facts remained unresolved without trial upon the merits. The matter presents a question of first impression in Mississippi. The learned Circuit Court failed to construe available facts from the injured insured's perspective (standpoint). The Court failed to consider the effect of multiple vehicles and multiple claims, matters not addressed in the statutes. The purpose of uninsured / underinsured motorist insurance dictates that the "limits" be construed as a comparison of

- (1) the actual liability insurance proceeds received by the injured insured (victim) to
- (2) the actual uninsured / underinsured motorist coverage

available to the same injured insured (victim).
Public policy militates against the mechanical application of
"limits" as defined in a policy's declarations page without
consideration of the effect of multiple claims. The Supreme
Court should address these issues as a matter of first impression
in Mississippi. The summary judgment should be reversed and
remanded for trial consistent with this Honorable Court's
directions.

Respectfully submitted,

THELMA BYRD, Appellant

By:

A handwritten signature in dark ink, appearing to read "Lee Edward Young", is written over a horizontal line.

LEE EDWARD YOUNG,
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the undersigned has this day caused to be hand delivered or mailed, postage prepaid and firmly affixed thereto, a true and correct copy of the foregoing writing to the following:

HON. KATHY KING JACKSON, Circuit Judge
19th Circuit Court District
Jackson County Courthouse
3104 Magnolia Street
Post Office Box 998
Pascagoula, MS 39568-0998
(601) 769-3244 / fax 762-3262
Trial Judge

FLOYD G. HEWITT, JR., Esq. (MSB #2415)
Compton, Crowell and Hewitt, P.L.L.C.
Attorneys at Law
146 Porter Avenue
Post Office Drawer 1937
Biloxi, Mississippi 39533-1937
(228) 374-4940, fax (228) 432-1126
Attorneys for Defendant Mary Byrd Ellis

ROGER T. CLARK, Esq. (MSB #6276)
KIM ROSETTI, Esq. (MSB #99394)
Bryant, Clark, Dukes, Blakeslee, Ramsay & Hammond, PLLC
2223 - 14th Street
Post Office Box 10
Gulfport, MS 39502
(228) 863-6101
Attorneys for Defendant Nationwide General Insurance Company

G. CHARLES BORDIS (MSB #3695)
Sadler, Ranson & Bordis
Post Office Box 848
Ocean Springs, MS 39564
(228) 875-1904 / fax (228) 875-6481
Attorneys for Defendant David S. Hutchinson

H. BENJAMIN MULLEN, Esq. (MSB #9077)
Bryan, Nelson, Schroeder, Castigliola, & Banahan
1103 Jackson Avenue
Post Office Drawer 1529
Pascagoula, MS 39568-1529
(228) 762-6631 / fax (228) 769-6392
Subrogation Attorneys for Defendant David S. Hutchinson

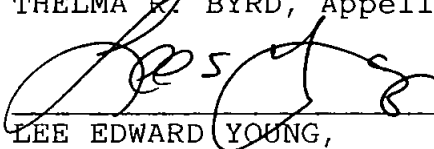
W. HARVEY BARTON (MSB #2104)
SKIP EDWARD LYNCH (MSB #10460)
Law Offices of W. Harvey Barton
3007 Magnolia Street
Pascagoula, MS 39567
(228) 769-2070 / fax (228) 762-5970
Attorneys for Andrew S. Odom

SO CERTIFIED, this the 10th day of ~~September~~^{October}, 2003
at Pascagoula, Jackson County, Mississippi.

Respectfully submitted,

THELMA R. BYRD, Appellant

By:


LEE EDWARD YOUNG,
Attorney for Plaintiff/Appellant

Lee Edward Young (MSB #9061)
Young Law Firm, P.C.
Suite One
1407 Jackson Avenue
Post Office Drawer 700
Pascagoula, MS 39568-0700
(228) 769-8840 / fax (228) 769-8868
Attorney for Plaintiff / Appellant Thelma R. Byrd