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**IN THE SUPREME COURT OF MISSISSIPPI**

**DOCKET NUMBER: 2003-CA-00241**

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**THELMA R. BYRD**

**PLAINTIFF / APPELLANT**

**VERSUS**

FILED  
JUL 17 2003  
OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS

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

**DEFENDANTS / APPELLEES**

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

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**BRIEF OF PLAINTIFF / APPELLANT**

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**Oral Argument Requested**

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VERSUS

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

DEFENDANTS / APPELLEES

---

CERTIFICATE OF INTERESTED PERSONS

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"The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal."

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---

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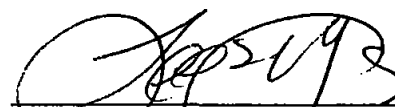
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Respectfully submitted,

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By:



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Attorney for Plaintiff/Appellant

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#### CONSTITUTIONS

Mississippi

None

United States

None

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Mississippi

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STATEMENT OF ISSUES

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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.

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STATEMENT OF THE CASE

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A.  
NATURE OF THE CASE

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This appeal considers:

- A. The effect of motor vehicle liability insurance proceeds of a single policy (no "stacking") apportioned among multiple injured persons upon an injured party's underinsured motorist insurance benefits claim and
- B. The propriety of summary judgment for Defendant Nationwide General Insurance Company on the issue of uninsured / underinsured motorist coverage before resolution of material facts, such as the effective amount of coverage.

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B.  
COURSE OF PROCEEDINGS BELOW

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LITIGATION

On November 1, 2001, Plaintiff filed her First Amended Complaint (exhibit "A", CP.7-11), alleging that,

- A. On November 28, 1998 and while Plaintiff Thelma R. Byrd was a passenger in Defendant Mary Byrd Ellis' automobile, the

- Ellis' automobile collided with another automobile operated by Defendant David S. Hutchinson (CP.8¶6, CP.9¶11, T.3) and
- B. As a direct and proximate result of the said collision, Plaintiff Byrd was severely injured (CP.9¶9) (detailed hereafter) and
  - C. Plaintiff's injuries were proximately caused by the negligence of Defendants Ellis and Hutchinson (CP.8¶¶7-8).
  - D. Defendant Nationwide General Insurance Company issued a policy of automobile liability insurance to Defendant Ellis (CP.9¶12).

#### PRE-TRIAL PROCEEDINGS

##### Nationwide General Insurance Company's Motion for Summary Judgment

On July 25, 2002, Defendant Nationwide General Insurance Company filed Nationwide General Insurance Company's Motion for Summary Judgment (CP.3-6), together with:

- A. Plaintiff's First Amended Complaint (exhibit "A", CP.7-11);
- B. Separate Answer of Nationwide General Insurance Company to First Amended Complaint (exhibit "B", CP.12-17);
- C. A certified copy of Nationwide General Insurance Company's policy number 89-23-937-905 (exhibit "C", CP.18-47); and
- D. Affidavit of Thelma R. Byrd (Exhibit "D", CP.48).

The relevant portion of the affidavit stated:

1. I am an adult resident citizen of Jackson County, Mississippi; that I am under no disability; and that I make this affidavit on personal knowledge;
2. On November 27, 1998, I was a passenger in a motor vehicle which was involved in an automobile accident;
3. At the time of the accident, I carried no personal automobile liability insurance.

FURTHER AFFIANT sayeth not, this the 6 day of June, 2002.

Nationwide General Insurance Company

Nationwide General Insurance Company's Itemization of Facts

On July 25, 2002, Defendant Nationwide General Insurance Company filed its Itemization of Facts (CP.49-51) which stated in pertinent part:

1. On November 28, 1998, Mary Byrd Ellis had an automobile liability insurance policy including uninsured motorist coverage through Nationwide General Insurance Company. The Nationwide insurance policy included liability limits in the amount of \$100,000.00 per occurrence and uninsured motorist limits in the amount of \$50,000.00 per occurrence.
2. On November 28, 1998, Plaintiff Thelma R. Byrd did not have personal automobile insurance.
3. On November 28, 1998, Plaintiff Thelma R. Byrd was a passenger in a vehicle owned and operated by Defendant Mary Byrd Ellis when a collision occurred between Ellis' vehicle and a vehicle operated by David Hutcheson.

(CP.49)



Hearing on Nationwide's Motion for Summary Judgment

On December 11, 2002, Nationwide General Insurance Company's motion for summary judgment came on to be heard (T.1, 3).

Nationwide's sole issue was whether Plaintiff Byrd was injured by an "underinsured motorist" (T.4). Nationwide argued that, under Mississippi law, the Court need only compare

- (1) the limits of liability coverage of the Ellis motor vehicle (\$100,000) with
- (2) "stacked" (aggregated) limits of uninsured motorist coverage applicable to Plaintiff Byrd (\$50,000) (T.4-5, 11)

to conclude that underinsured motorist coverage did not apply (T.5, 11).

Plaintiff Byrd stated that the question is whether Nationwide's uninsured / underinsured motorist coverage was "triggered" (T.7, 12). Plaintiff Byrd stated that the question has not been answered by the Supreme Court in the context of multiple claimants (T.8, 13).

Plaintiff Byrd stated that she was not "stacking" (aggregating) multiple uninsured motorist coverages (T.6). Plaintiff Byrd sought uninsured motorist benefits under the

Ellis' policy as a passenger aboard Ellis' vehicle (T.6-7).

There are three (3) plaintiffs claimed against the liability insurance (Hutchinson, Odom, and Byrd) (T.7-8). Plaintiff Byrd will not receive the liability insurance \$100,000.00 limit because there are at least three (3) claimants (T.7-8, 12). Plaintiff Byrd will receive a fraction of the \$100,000.00 (T.12) which fraction is yet undetermined. An equal apportionment of Nationwide's \$100,000.00 liability insurance benefits among three (3) claimants (plaintiffs) at \$33,333.33 each, means that Plaintiff Byrd would receive less than Nationwide's \$50,000 underinsured motorist liability coverage limit (T.7-8). Thus, Defendant Ellis was an underinsured motorist, "triggering" Nationwide's underinsured motorist coverage (T.7, 9) and Plaintiff Byrd should recover under the underinsured motorist insurance (T.7-8).

Hutchinson had \$25,000.00 of liability insurance (T.10). Assuming that Hutchinson bears part culpability for the collision to trigger insurance, then Hutchinson's liability insurance is also less than Nationwide's \$50,000 underinsured motorist liability coverage limit (T.10). Plaintiff Byrd should recover underinsured motorist benefits (T.10).

Circuit Court Order Granting Summary Judgment

On January 3, 2003, the Circuit Court of Jackson County entered its Order Granting Motion for Summary Judgment in favor of Defendant Nationwide General Insurance Company (CP.53-54; Jackson County Circuit Court MB238, PP759-760) concluding:

To determine if the Ellis vehicle was underinsured, the Court must compare the guest passenger's own coverage to that of the host vehicle's coverage. See Fidelity and Guaranty Underwriters, Inc. v. Earnest, 699 So.2d 585, footnote 3 (Miss. 1997); Thiac v. State Farm Mutual Automobile Insurance Co., 569 So.2d 1217 (Miss. 1990). Using this analysis, the Court notes that Byrd did not have any insurance coverage and Ellis has \$100,000.00 limit under her liability policy. As such, the Ellis vehicle does not qualify as an underinsured vehicle. Because of this finding, Ellis' UM coverage is not triggered and Byrd cannot look to this coverage for compensation for her injuries.

IT IS THEREFORE ORDERED that the Motion for Summary Judgment on behalf of the Defendant Nationwide General Insurance Company is hereby GRANTED.

SO ORDERED this the 3rd day of Jan, 2003.  
(CP.54, MB238 P760)

APPEAL

On January 31, 2003, Plaintiff Byrd filed her

- (1) Notice of Appeal (CP.55-56) and
- (2) Designation of Record (CP.57-58) and
- (3) Certificate of Compliance with Rule 11(b)(1) MRAP (CP.59-60).

On April 1, 2003, the Circuit Clerk entered his Certificate

of Circuit Clerk to Transcript of Record (CP.62).

On May 9, 2003, the Circuit Court entered its Amended Order Granting Motion for Summary Judgment and Final Judgment Nunc Pro Tunc (MB244, P369).

On May 14, 2003, Appellant's counsel filed Appellant's Motion to Supplement the Record to include the Circuit Court's Amended Order Granting Motion for Summary Judgment and Final Judgment Nunc Pro Tunc (Exhibit "A" to Motion).

On May 15, 2003, this Honorable Court issued its Notice that Appellant's motion had been GRANTED.

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C.  
STATEMENT OF FACTS

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Parties

Plaintiff Thelma R. Byrd is an adult resident citizen of Escatawpa, Jackson County, Mississippi (CP.7¶1, 48).

Defendant Mary Byrd Ellis is an adult resident citizen of Escatawpa, Jackson County, Mississippi (CP.7¶2). Defendant Mary Byrd Ellis is the daughter of Plaintiff Thelma R. Byrd (T.3).

Defendant David S. Hutchinson is an adult resident citizen of Ocean Springs, Jackson County, Mississippi (CP.7¶3).

Defendant Nationwide General Insurance Company is a foreign insurance corporation authorized to do business in Mississippi (CP.8¶4, 13¶4).

Motor Vehicle Insurance

On November 28, 1998, Plaintiff Thelma R. Byrd, born February 6, 1918 and then age eighty (80), did not have personal automobile insurance (CP.49, T.3).

On November 28, 1998, Defendant Mary Byrd Ellis had an automobile liability insurance policy including uninsured motorist coverage issued by Defendant Nationwide General Insurance Company (CP.49; T.3).

Nationwide General Insurance Company's insurance policy (Exhibit "C", CP.18) included

- (1) Motor vehicle liability insurance coverage to \$100,000.00 per occurrence and
- (2) Uninsured / Underinsured Motorist coverage to \$50,000.00 per occurrence

(CP.19-20 (declarations pages), 49; T.3).

Nationwide General Insurance Company's insurance policy included Endorsement 468C, uninsured motorist coverage (Mississippi) (CP.21) which provided in part:

This endorsement replaces the policy's Uninsured Motorist Coverage. Coverage is subject to all other terms and conditions of the policy, except as specifically changed by this endorsement.

1. "UNINSURED MOTOR VEHICLE" means:
  - a) one for which there is no liability bond or insurance at the time of the accident.
  - b) one for which liability coverage or bonds are in effect; however, their total amount is less than the limits of this coverage shown in the policy Declarations.
  - c) one for which the insuring company denies coverage or becomes insolvent within one year of the accident.
  - d) a "hit and run" motor vehicle which causes:

\* \* \*

**YOU AND A RELATIVE**

We will pay compensatory damages, including derivative claims, which are due by law to **you** or a **relative** from the owner or driver of an **uninsured motor vehicle**:

1. because of **bodily injury** suffered by **you** or a **relative**; or

2. **property damage.**

(**Bold** original, underline emphasis supplied) (CP.21).

Motor Vehicle Collision

On November 28, 1998, Plaintiff Thelma R. Byrd was a passenger in a vehicle owned and operated by Defendant Mary Byrd Ellis when a collision occurred between Defendant Ellis' vehicle and a vehicle operated by Defendant David Hutchinson (CP.8¶6, 49; T.3).

Defendant Ellis' vehicle struck Defendant Hutchinson's vehicle which then collided with yet another vehicle (T.7-8).

Injuries

On November 28, 1998, Plaintiff Byrd suffered:

- (1) closed fracture of right acetabulum with posterior dislocation of the right hip and
- (2) closed comminuted fracture of the right distal radius and
- (3) multiple facial contusions / abrasions and
- (4) right knee contusion / abrasion and
- (5) left knee abrasion.

Medical Treatment

On November 28, 1998, Plaintiff Byrd underwent surgical correction and treatment for the same, together with appropriate

follow-up hospital care.

On December 18, 1998 Plaintiff Byrd was discharged from orthopaedic care to sub-acute hospital care. Due to the hip injury, Plaintiff Byrd was kept on absolute bed rest and with traction to her right wrist, considered an unstable fracture.

On January 11, 1999, Plaintiff Byrd began physical therapy.

On January 14, 1999, the external fixator of her right forearm was removed.

On February 5, 1999, Plaintiff Byrd was released to home care to be followed on an outpatient basis.

On or about March 27, 2002, Plaintiff Byrd suffered a "pop" in her right hip, later diagnosed as a shattered and displaced fracture of her right hip.

On or about April 13, 2002, Plaintiff Byrd underwent total right hip replacement.



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SUMMARY OF THE ARGUMENT

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PROPOSITION 1

THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT DESPITE  
CONTESTED ISSUES OF MATERIAL FACT

The Circuit Court clearly granted final judgment upon all issues as to Defendant Nationwide General Insurance Company. The Court erred. Material facts, including the "limits" of liability insurance, were sharply disputed. An accurate comparison of limitations of available coverage could not be made. Absent undisputed material facts, Defendant Nationwide General Insurance Company failed to meet its burden to prove beyond a reasonable doubt that Nationwide was entitled to judgment as a matter of law. Thus, it was error to grant summary judgment to Nationwide.

The matter was not ripe for judgment. Summary judgment was premature. Defendant Nationwide General Insurance Company moved for summary judgment upon a mechanical comparison of its policy's face value statements of limitations without regard to the effect of multiple claimants.

Although no resolution of any of these issues emerged, the Circuit Court erroneously granted summary judgment for Defendant Nationwide General Insurance Company. The Circuit Court erred

procedurally. This matter should be remanded for trial on the merits.

## PROPOSITION 2

NATIONWIDE WAS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW

The meaning of Section 83-11-103(c)(iii) Mississippi Code 1972 is not self-evident. The Mississippi Supreme Court does not appear to have directly addressed a situation as presented here involving multiple vehicles, multiple claimants, and competing claims under a single policy (i.e. no "stacking" (aggregation) of insurance coverages). Reduction of the Defendant Mary Byrd Ellis' effective limits of coverage as a result of multiple claimants (Hutchinson, Odom, and Byrd) creates an operative underinsured situation. Disbursement of insurance proceeds to competing claimants reduces available coverage and renders the tortfeasor underinsured.

The drafters of the Act sought to ensure that innocent victims of inadequately insured motorists were compensated in that the victims were put in the same position that the victims would have occupied had the tortfeasor had adequate liability coverage. Accordingly, the Act is to be liberally construed so as to achieve compensation. The Mississippi Supreme Court has consistently construed our uninsured motorist statute from the

perspective of the insured. From the perspective of the victim (insured) in multiple claims situations (as here), the tortfeasor is underinsured when the amount of liability coverage is less than the underinsured motorist coverage available to the victim (insured). As to Plaintiff Byrd, Defendant Ellis was an underinsured motorist. One of the principal purposes of insurance is to provide "peace of mind." The Act should be interpreted by honoring the expectations of the insured (that the insured victim will be covered if the tortfeasor is uninsured or underinsured).

Nationwide's policy is ambiguous. Under Mississippi law, uninsured motorist coverage is not always measured by a simple "limits versus limits" calculation as sometimes claimed. A comparison of the amount of insurance actually available, not simply mechanical addition of face value statements, governs underinsured motorist coverage.

**The determination of the amount of "available" insurance is a fact intensive process, i.e. ill suited for summary judgment.** The Circuit Court prematurely terminated the requisite fact finding process. The trial court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried. "Available" insurance refers to sums reasonably obtainable.

Other states have rejected the result of the mechanical determination: that a victim is better off being struck by uninsured motorist rather than by an inadequately insured motorist because such a result is illogical. Instead, they look to effective liability coverage.

This Honorable Court should hold that, in light of the remedial purposes of the Act, then "available" or "effective" limits of coverage govern multiple claimant uninsured motorist situations.

This Honorable Court should remand this action for trial on the merits.

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## ARGUMENT

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### Standards of Review

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#### General Standards of Review.

The Mississippi Supreme Court does not sit to redetermine questions of fact. Matter of City of Horn Lake, 630 So.2d 10, 19 (Miss. 1993).

The Supreme Court employs a de novo standard of review when passing on questions of law. State v. Baptist Memorial Hospital - Golden Triangle, 726 So.2d 554, 557 (Miss. 1998). Legal conclusions are also reviewed de novo. Andrew Jackson Life Insurance Co. v. Williams, 566 So.2d 1172, 1183-1184 (Miss. 1990).

Under Mississippi law, uncontradicted evidence is accepted as true. James v. Mabus, 574 So.2d 596, 600 (Miss. 1990).

#### Review of Summary Judgments.

The Mississippi Supreme Court applies a de novo standard of review on appeal from a grant of summary judgment by the trial court. Travellers Property Casualty Corp. v. Stokes, 838 So.2d 270, 273-274 (Miss. 2003) (en banc) (school bus driver claimed Uninsured Motorist Insurance benefits arising from an uninsured motorist's collision with w/ Friends of Children of Mississippi's

school bus). Summary judgment is reviewed de novo not only upon the facts established by the evidence, but also the implications to be drawn from the facts. Patton-Tully Transportation Company v. Douglas, 761 So.2d 835, 838 (Miss. 2000).

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PROPOSITION 1  
THE CIRCUIT COURT PREMATURELY ENTERED SUMMARY JUDGMENT  
UPON DISPUTED MATERIAL FACTS

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The Circuit Court clearly granted final judgment upon all issues as to Defendant Nationwide General Insurance Company. The Circuit Court erred.

Under Mississippi practice, "summary judgment, in whole or in part, should be granted with great caution." Brown v. Credit Center, Inc., 444 So.2d 358, 363 (Miss. 1983).

Disputed Material Facts

Material facts, including the "limits" of liability insurance, were unresolved as well as:

- (1) The sum, if any, that Plaintiff Thelma R. Byrd would receive from Defendant Nationwide General Insurance Company under Nationwide's motor vehicle liability coverage was unknown and/or
- (2) The sum, if any that the other claimants would receive under Nationwide's motor vehicle liability coverage was unknown.
- (3) Whether other claimants would qualify as victims of an underinsured motorist was unknown (affecting the availability of underinsured motorist benefits for Plaintiff Byrd).

Lacking any evidence of the same, an accurate comparison of limitations of available coverage could not be made. Absent this critical information, Defendant Nationwide General Insurance Company failed to meet its burden that Nationwide was entitled to judgment as a matter of law. Thus, it was error to grant summary judgment to Nationwide.

Under the circumstances, Defendant Nationwide General Insurance Company necessarily conceded:

- (1) That Defendant Nationwide General Insurance Company's insured, Defendant Mary Byrd Ellis, proximately caused 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.

Plaintiff Byrd admitted that if Plaintiff Byrd received all of Nationwide's liability insurance benefits, then Plaintiff Byrd



had no underinsured motorist claim (T.7). But, no one produced evidence of receipt of any liability insurance benefits. The matter was not ripe for judgment. Summary judgment was premature.

The Circuit Court erred because genuine issues of material fact (including the foregoing genuine issues of material fact) remained unresolved when the Court granted summary judgment.

Nationwide's Burden of Persuasion.

Defendant Nationwide General Insurance Company failed to carry its burden. Defendant Nationwide General Insurance Company bore the burden of persuading the Circuit Court beyond a reasonable doubt. Lumberman's Underwriting Alliance v. City of Rosedale, 727 So.2d 710, 713 (Miss. 1998). As the moving party, Defendant Nationwide General Insurance Company bore the burden of persuasion:

- (1) That there was no genuine issue as to any material fact and
- (2) That Defendant Nationwide General Insurance Company was entitled to judgment as a matter of law.

Corey v. Skelton, 834 So.2d 681, 684 (Miss. 2003). Under Rule 56 MRCP, a fact was "material" if it tended to resolve any of the issues properly raised by the parties and matters in an outcome determinative sense. Adams v. Cinemark USA, Inc., 831 so.2d

1156, 1161-1162 (Miss. 2002).

As the non-moving party, Plaintiff Thelma R. Byrd was entitled to the benefit of every reasonable doubt. Corey v. Skelton, 834 So.2d 681, 684 (Miss. 2003). The Circuit Court had to view the evidence in the light most favorable to Plaintiff Thelma R. Byrd, the non-moving party. Travellers Property Casualty Corp. v. Stokes, 838 So.2d 270, 273-274 (Miss. 2003) (en banc).

Defendant Nationwide General Insurance Company moved for summary judgment upon a mechanical comparison of its policy's gross liability insurance limitations of coverage to its gross underinsured motorist limitations of coverage without regard to the effect of other claims and availability of coverage. Plaintiff Byrd argued that the Court ought to consider the effect of other parties' recovery from the limited liability insurance so as to reduce the liability insurance limitation of coverage to a value less than the uninsured motorist limitation of coverage.

Although no resolution of any of these issues emerged, the Circuit Court erroneously granted summary judgment for Defendant Nationwide General Insurance Company. The Circuit Court erred procedurally. This matter should be remanded for trial on the merits.

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PROPOSITION 2  
NATIONWIDE WAS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW

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Question of First Impression

The meaning of Section 83-11-103(c)(iii) Mississippi Code 1972 is not self-evident. Witness the extensive litigation surrounding it. The Mississippi Supreme Court does not appear to have directly addressed a situation as presented here involving multiple vehicles, multiple claimants, and competing claims under a single policy (i.e. no "stacking" (aggregation) of insurance coverages).

Plaintiff Byrd has found no Mississippi case on point. The closest Mississippi case appears to be Guardianship of Lacy v. Allstate Insurance Co., 649 So.2d 195 (Miss. 1995) (en banc) (passenger injured in multiple vehicle collision may not aggregate all uninsured motorist coverage of all persons in the collision to qualify a vehicle as underinsured), where the Supreme Court considered the term "limits" in uninsured benefits in a multi-vehicle collision (as here). The Court quoted the Act and noted:

\* \* \*. We have never considered the question of the effect of the above quoted language in a case where there is more than one "injured person," as in a multiple vehicle collision. \* \* \*.

[649 So.2d at 199].

The Lacy Court discussed Mississippi Farm Bureau Mutual Insurance Co. v. Garrett, 487 So.2d 1320 (Miss. 1986) and Harthcock v. State Farm Mutual Automobile Insurance Co., 248 So.2d 456, 462 (Miss. 1971) and concluded:

Although these two cases are not directly on point, they do lend light to the principle that the term "limits" refers to what an insured may or may not receive from the liability carrier, particularly when it involves multiple claims, and if it is less than his UM coverage he may then aggregate.  
649 So.2d at 198].

Lacy, supra, is consistent with St. Arnaud v. Allstate Insurance Co., 501 F.Supp. 192, 193 (S.D. Miss. 1980) (U.S. District Court compared reduced liability coverage available to plaintiff with UM limits).

Multiple Claims and Single Policy Underinsurance is Underinsured.

Reduction of the Defendant Mary Byrd Ellis' effective limits of coverage as a result of multiple claimants (Hutchinson, Odom, and Byrd) creates an operative underinsured situation. Disbursement of insurance proceeds to competing claimants reduces available coverage and renders the tortfeasor underinsured. See Phillips, Underinsured Motorist Coverage in Mississippi, 3 Miss.C.L.Rev. 65, 82-83 (1983).

Mississippi Underinsured Motorist Public Policy.

The drafters of the Uninsured / Underinsured Motorist Insurance Act sought to ensure that innocent victims of uninsured / inadequately insured motorists were compensated in the that the victims were put in the same position that the victims would have occupied had the tortfeasor had adequate liability coverage (equal to the uninsured motorist coverage).

The remedial nature of the uninsured motorist Act compels broad application. Parker v. Cotton Belt Insurance Co., 314 So.2d 342, 344 (Miss. 1975). The Act is to be liberally construed so as to achieve compensation, the reason being that "uninsured motorist coverage is designed to provide innocent injured motorists a means to recover all sums to which they are entitled from an uninsured motorist." U.S.F. & G. v. Ferguson, 698 So.2d 77, 80 (Miss. 1997). 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) (carrier could not limit its UM limits by money paid under liability policy to other passengers); Thiac v. State Farm Mutual Automobile Insurance Co., 569 So.2d 1217, 1220 (Miss. 1990). From the perspective of the victim (insured) in multiple claims situations (as here), the tortfeasor is underinsured when the amount of

liability coverage is less than the underinsured motorist coverage available to the victim (insured). As to Plaintiff Byrd, Defendant Ellis was an underinsured motorist. One of the principal purposes of insurance is to provide "peace of mind." Andrew Jackson Life Insurance Co. v. Williams, 566 So.2d 1172, 1174-1175 (Miss. 1990). The Act should be interpreted by honoring the expectations of the insured (that the insured victim will be covered if the tortfeasor is uninsured or underinsured). U.S.F. & G. v. Ferguson, 698 So.2d 77, 83 (Miss. 1997) (Lee, C.J., concurring).

Some Mississippi decisions, such as Thiac v. State Farm Automobile Insurance Co., 569 So.2d 1217 (Miss. 1990), presume a tort victim's carelessness because the tort victim failed to procure greater UM insurance. Due to her advanced age (80) and/or non-operation of motor vehicles by senior citizens, Plaintiff Byrd did not have the ready ability to procure other coverage. This unwarranted presumption of a material fact (ability to procure insurance) appears in unfortunate cases such as Cossitt v. Federated Guaranty Mutual Insurance Co., 541 So.2d 436 (Miss. 1989) wherein the Court reached an admittedly "anomalous result" that a tort victim may be better off being injured by an uninsured tortfeasor rather than an underinsured tortfeasor (541 So.2d at 440).

The Uninsured Motorist Insurance Act.

Under Section 83-11-101(1) Mississippi Code 1972,

(1) No automobile liability insurance policy or contract shall be issued or delivered after January 1, 1967, unless it contains an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages for bodily injury or death from the owner or operator of an uninsured motor vehicle, . . . . \* \* \*.

Section 83-11-103(c)(iii) Mississippi Code 1972 provides:

(c) the term "uninsured motor vehicle" shall mean:  
\* \* \*; or

(iii) An insured motor vehicle, when the liability insurer of such vehicle has provided limits of bodily injury liability for its insured which are less than the limits applicable to the injured person provided under his uninsured motorist coverage; or  
\* \* \*.

In Thiac v. State Farm Mutual Automobile Insurance Co., 569 So.2d 1217 (Miss. 1990) (guest passenger without her own insurance was injured in a single vehicle automobile accident and sued driver's insurer for underinsured motorist benefits after collecting policy limit liability benefits from the carrier), the Court cited Wickline v. U.S. Fidelity & Guaranty Co., 530 So.2d 708 (Miss. 1988) (driver of the vehicle with guest passenger was at fault) and concluded ". . . we look no further than the guest passenger's own coverage and the coverage on the host vehicle." (569 So.2d at 1221). The Thiac court ruled that, since the Act prohibits UM coverage exceeding liability coverage in the same policy and liability policy limits were paid to a single victim

(insured), then the single vehicle could not be underinsured (569 So.2d at 1221). More recently, in Fidelity and Guaranty Underwriters, Inc. v. Earnest, 699 So.2d 585, 590 (Miss. 1997), the Court noted that underinsured motorist status is determined by comparison of tortfeasors' liability coverage limits with the victim's (insured's) "stacked" UM coverage limits.

#### The Insurance Policy.

What is the meaning of "coverage"? It is instructive to compare the Act to Defendant Nationwide General Insurance Company's policy language:

\* \* \*

1. "UNINSURED MOTOR VEHICLE" means:
  - a) one for which there is no liability bond or insurance at the time of the accident.
  - b) one for which liability coverage or bonds are in effect; however, their total amount is less than the limits of this coverage shown in the policy Declarations.

\* \* \*

(Underline supplied). (CP.21).

#### Defining Terms.

What does "limits" mean? What does "their total amount" mean? Are these terms equivalent? <sup>1</sup> Nationwide's policy is

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<sup>1</sup> In Mississippi Farm Bureau Mutual Insurance Co. v. Garrett, 487 So.2d 1320 (Miss. 1986), the Court considered insurance policy language:

When more obscure sentences are written, a major  
(continued...)



ambiguous.

Under Mississippi law, uninsured motorist coverage is not always measured by a simple "limits versus limits" calculation as sometimes claimed. See, e.g., Washington v. Georgia American Insurance Co., 540 So.2d 22, 26 (Miss. 1989).

What defines the "limit"? For example, in Wickline v. U.S. Fidelity & Guaranty Co., 530 So.2d 708, 712 (Miss. 1988), this Court stated

For the uninsured underinsured motorist provisions of the U.S.F.&G. policy [to] come into play, the Carter Thunderbird must be an "uninsured motor vehicle" as defined in the statute. The answer to this question is determined by comparing the amount of uninsured motorist coverage available to the amount of liability insurance available. (underline supplied). (530 So.2d at 712).

Thus, a comparison of the amount of insurance actually available, not simply mechanical addition declaration sheet statements, governs underinsured motorist coverage. The "available" coverage is consistent with Lacy, supra, and St. Arnaud, supra.

**The determination of the amount of "available" insurance is a fact intensive process, i.e. ill suited for summary judgment.**

The Circuit Court prematurely terminated the requisite fact finding process. The trial court cannot try issues of fact on a

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<sup>1</sup>(...continued)

source will be the pens of the draftsmen of insurance policies. The sentence at issue is actually one of the less offensive -- it is only ambiguous. \* \* \*. (487 So.2d at 1324).

Rule 56 motion; it may only determine whether there are issues to be tried. Lumberman's Underwriting Alliance v. City of Rosedale, 727 So.2d 710, 713 (Miss. 1998) (fire insurer's subrogation action).

"Available" insurance does not mean policy stated limitations of coverage. In Mississippi Farm Bureau Mutual Insurance Co. v. Garrett, 487 So.2d 1320 (Miss. 1986) (guest passenger settled with host driver's uninsured motorist carrier and then sought benefits from guest's uninsured motorist carrier), the Supreme Court considered the meaning of "available"; noted the risks of litigation; determined that "available" meant "prima facie reasonable" (487 So.2d at 1323); and concluded:

The word "available" in the policies in issue refers to those sums reasonably obtainable by Garrett having in mind the nature and extent of his injuries, the facts regarding the liability of the uninsured motorist, the amount of the settlement offered, discounted by the costs and risks of seeking a greater sum.  
(487 So.2d at 1324).

#### Foreign Jurisdictions

Other states have rejected the result of the mechanical determination: that a victim is better off being struck by uninsured motorist rather than by an inadequately insured motorist because such a result is illogical. Instead, they look

to effective liability coverage.

Louisiana

In Butler v. MFA Mutual Insurance Company, 356 So.2d 1129, 1131-1132 (La.App. 2d Cir. 1978) (Where the amount of tortfeasors' liability coverage actually available to the injured insured (as opposed to the face value of the coverage) was less than the limits of the insured's uninsured motorist coverage, it was held that the uninsured motorist statute "should be construed to mean the effective liability coverage," rather than the liability coverage appearing on the face of the policy) (Emphasis in original)(356 So.2d at 1133). The Louisiana Court of Appeals determined that

\* \* \*. Because of the multiple claims filed against the insurers of these vehicles, and the court's apportionment of the policy proceeds, the effective liability insurance was less than the uninsured motorist coverage carried by plaintiff. The 1972 amendment of the statute expanded the protection afforded to an insured under the original statute to include damages caused to the insured by underinsured motor vehicles as well as vehicles without liability insurance. **It is apparent that the Legislature intended the insured should be reimbursed by his own insurer in these instances in the amount at least equal to the uninsured motorist coverage carried by him. Where the liability insurance on the automobile causing the insured's damage is ineffective for any reason to pay for the insured this required amount, then the vehicle should be deemed "uninsured" for the purpose of resolving recovery of uninsured motorist protection.** \*

\* \*

(**Bold** emphasis supplied). (356 So.2d at 1132-1133).

## New Mexico

In State Farm Mutual Automobile Insurance Company v. Valencia, 120 N.M. 662, 905 P.2d 202 (N.M.App. 1995), the Court held that, as a matter of first impression:

The dispositive question posed here is whether, when there are multiple claimants whose total damages exceed the amount of insurance coverage available under a tort-feasor's liability coverage, Section 66-5-301(B) should be read to mean that the tort-feasor is underinsured only when the limits of his or her liability coverage are less than the injured parties uninsured motorist coverage, or that the tort-feasor is underinsured when the amount of the tort-feasor's liability coverage that is actually made available to the injured insureds is less than the limits of their uninsured motorist coverage. We determine that the latter interpretation applies in such situation. (120 N.M. at 663, 905 P.2d at 203).

The New Mexico court considered other jurisdictions and concluded:

In sum, we hold that in multiple claimant situations, insured motorists who are covered under an uninsured / underinsured motorist policy and who suffer injuries resulting from an automobile accident are entitled to collect up to the limit of their underinsurance policy to the extent that their damages exceed the amounts that the tort-feasor's insurer previously paid to them. (120 N.M. at 665, 905 P.2d at 205).

## Ohio

The measure of a tortfeasor's liability coverage is the amount of liability proceeds actually available to an injured insured, rather than the face amount of the tortfeasor's policy.

Brown v. Erie Insurance Co., 35 OhioApp.3d. 11, 519 N.E.2d 408, 409-410 (1986).

In Knudson v. Grange Mutual Companies, 31 OhioApp.3d 20, 507 N.E.2d 1155, 1157-1158 (1986), the Court concluded that adopting a view in multiple claimant situations (as here) the focus is upon the liability proceeds actually available to a given insured, rather than upon the stated policy limits of a tortfeasor's liability coverage, and that focus upon the stated policy limits tended to produce the illogical, undesirable situation which the Legislature sought to avoid.

#### Conclusion

This Honorable Court should hold that in light of the remedial purposes of the Act, then "available" or "effective" limits of coverage govern multiple claimant uninsured motorist situations. This Honorable Court should remand this action for trial on the merits.

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#### CONCLUSION

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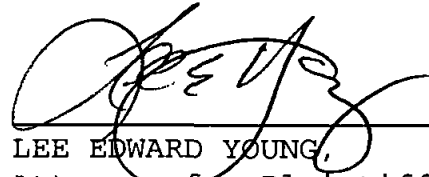
The Circuit Court erred in prematurely granting summary judgment while critical facts remained to be determined. Additionally, public policy militates against the mechanistic

application of "limits" without considerations of multiple claims. The Supreme Court should address these issues as a matter of first impression. For these reasons, the summary judgment should be reversed and remanded for trial.

Respectfully submitted,

THELMA BYRD, Appellant

By:

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

LEE EDWARD YOUNG,  
Attorney for Plaintiff/Appellant

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CERTIFICATE OF SERVICE

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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:

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SO CERTIFIED, this the 15<sup>th</sup> day of July, 2003, at  
Pascagoula, Jackson County, Mississippi.

Respectfully submitted,

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