IN THE SUPREME COURT OF MISSISSIPPI

FRANKLIN COUNTY MEMORIAL HOSPITAL — APPELLANT

v. — CAUSE NO. 2007-TS-00142

MISSISSIPPI FARM BUREAU MUTUAL INSURANCE COMPANY — APPELLEE

BRIEF OF APPELLEE
MISSISSIPPI FARM BUREAU MUTUAL INSURANCE COMPANY

ON APPEAL FROM THE CIRCUIT COURT OF FRANKLIN COUNTY, MISSISSIPPI

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons or entities 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:

1. Appellant Franklin County Memorial Hospital;

2. American States Insurance Company, the liability insurer of Appellant Franklin County Memorial Hospital;

3. Timothy D. Crawley and Robert L. Grant of Anderson, Crawley & Burke, PLLC, attorneys for Appellant Franklin County Memorial Hospital and American States Insurance Company;

4. Lane B. Reed of McGehee, McGehee & Torrey, attorney for Appellant Franklin County Memorial Hospital and American States Insurance Company;

5. Appellee Mississippi Farm Bureau Mutual Insurance Company;

6. Sam S. Thomas, attorney for Appellee Mississippi Farm Bureau Mutual Insurance Company; and

7. Honorable Forrest A. Johnson, Franklin County Circuit Court Judge.

CERTIFIED, this the 25th day of July, 2007.

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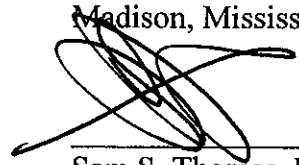

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STATEMENT REGARDING ORAL ARGUMENT

This case involves issues important to proper application of the Mississippi Tort Claims Act. While the issues are not really complicated, and Appellee Mississippi Farm Bureau Mutual Insurance Company submits this Court can readily and easily determine that Appellant Franklin County Memorial Hospital and its liability insurer cannot, as a matter of law under the Mississippi Tort Claims Act, shift their "secondary" and "primary" responsibility for claims governed by the Act to Appellee Mississippi Farm Bureau Mutual Insurance Company, as the liability insurer of the governmental employee at issue, oral argument is warranted because a decision adverse to Appellee Mississippi Farm Bureau Mutual Insurance Company would have a far-reaching and negative impact on governmental employees in cases governed by the Mississippi Tort Claims Act.

STATEMENT OF THE ISSUE

Whether the trial court properly entered summary judgment in favor of Appellee Mississippi Farm Bureau Mutual Insurance Company ("Farm Bureau") on the improper attempt of Appellant Franklin County Memorial Hospital ("FCMH") and its liability insurer, American States Insurance Company ("American States"), to shift the "secondary" responsibility of FCMH and the "primary" responsibility of American States to Farm Bureau, as the liability insurer of a governmental employee, Sydneye Marie Jordan ("Jordan"), for a claim wholly governed by the Mississippi Tort Claims Act.

STATEMENT OF THE CASE

A. Initial Pleadings

This action was filed by Boyce Dover ("Dover") against FCMH and Jordan on November 3, 2003. (R. 7). Dover sought damages from FCMH and Jordan as a result of an accident on June 14, 2002, when Dover was struck by a vehicle operated by Jordan, while Jordan was in the course and scope of her employment as a governmental employee of FCMH. (R. 8).

Jordan was dismissed from the case because "individual employees of public entities have immunity for acts alleged to have been committed in the course and scope of their employment under the Mississippi Tort Claims Act." (R. 1). Dover and FCMH both stipulated that Jordan "was in the course and scope of her employment with Franklin County Memorial Hospital when the incident involving" Dover and the "vehicle driven by" by Jordan occurred. (R. 1)

Jordan's dismissal was "with prejudice" to "all claims which were or could have been raised" in the trial court. (R. 1). The Order of Dismissal (R. 1-2), agreed to (as noted) by FCMH, specifically provided "no claim may be made against" Jordan, "nor any Judgment rendered against her in her individual capacity." (R. 1-2).

After the dismissal of Jordan, FCMH sought leave in the trial court to pursue a declaratory judgment action against Farm Bureau. (R. 3-38). As part of its request, FCMH acknowledged that the only claim remaining against FCMH was a claim by Dover "pursuant to the Mississippi Tort Claims Act, § 11-46-1, et seq., of the Mississippi Code of 1972, as amended." (R. 4).

FCMH alleged, in seeking leave to pursue declaratory relief against Farm Bureau, that Jordan "was insured at the time of the accident" under a "policy of automobile liability insurance issued by" Farm Bureau. (R. 4). Focusing on only one provision of the Farm Bureau policy issued to Jordan

(R. 4), FCMH argued it qualifies as an "Insured" for purposes of the liability coverage under the Farm Bureau policy. (R. 4-5). FCMH supplied the trial court, and thus this appellate record, a complete copy of the Farm Bureau policy. (R. 14-32).

By agreement of the parties at the time but not Farm Bureau, FCMH was allowed to file its Complaint for Declaratory Judgment. (R. 39). The Complaint for Declaratory Judgment was filed on February 11, 2005. (R. 41-46). FCMH relied, for its alleged coverage position and claims against Farm Bureau, on a single provision of the policy issued by Farm Bureau. (R. 43).

FCMH identified Jordan, for purposes of the declaratory relief sought by FCMH, as a "real party in interest as her coverage is implicated by the claims against the Hospital in the lawsuit, such that her future coverage for claims of a like nature, as well as her premiums for future automobile liability coverage, may be affected as well." (R. 44). FCMH asked the trial court to declare that Farm Bureau had a duty to defend and indemnify FCMH with regard to the claims made by Dover against FCMH under the Mississippi Tort Claims Act. (R. 45).

Farm Bureau timely responded to the Complaint for Declaratory Judgment. (R. 47-59). Farm Bureau asserted FCMH's lack of "standing to maintain or attempt to maintain the claims attempted to be stated" against Farm Bureau. (R. 47). Farm Bureau alleged FCMH failed to "join a necessary or indispensable party, or necessary or indispensable parties, or a party or parties needed for a just adjudication," and Farm Bureau raised the necessity to "join said party or parties." (R. 48).

Farm Bureau stated an affirmative defense that the "liability, if any, of FCMH as to the matter or matters at issue arises from and flows through the Mississippi Tort Claims Act" and, consistent with two opinions issued by the Attorney General of Mississippi, Farm Bureau noted it had no "duty

to defend or indemnify FCMH as to the matter or matters at issue." (R. 48). The referenced Attorney General opinions are in the record. (R. 55-59).

Farm Bureau further asserted both it and Jordan were "immune from any liability on the claim or claims attempted to be stated by FCMH." (R. 49). It asserted too that the "Mississippi Tort Claims Act is governing as to this action and the claims attempted to be stated by FCMH against Farm Bureau, with the Mississippi Tort Claims Act prohibiting any such claims and shielding Farm Bureau from any such claims." (R. 51).

Farm Bureau also pointed out the impact on all governmental employees, not just Jordan, of a "determination that Farm Bureau has a duty to defend and/or indemnify in this situation." (R. 52). In the end, Farm Bureau noted the simple fact that the "Mississippi Tort Claims Act prohibits the claims attempted to be stated by FCMH against Farm Bureau." (R. 52).

B. Motion for Partial Summary Judgment of FCMH

FCMH sought partial summary judgment against Farm Bureau. (R. 60-115). Yet again relying on a single provision of the policy issued by Farm Bureau, FCMH asked the trial court to determine, as a matter of law, that Farm Bureau had to defend and indemnify FCMH as to the claims of Dover. (R. 63 and 63-64).

C. Response and Cross-Motion for Summary Judgment of Farm Bureau

Farm Bureau responded to the summary judgment request of FCMH and, by cross-motion, requested the trial court to grant summary judgment in its favor on the duty to defend and/or indemnify issues. (R.116-196). Farm Bureau's basic arguments were that all claims of Dover against FCMH were premised on the Mississippi Tort Claims Act (R. 117); Jordan as the insured of Farm Bureau could have no liability to Dover or FCMH (R. 117); Farm Bureau and Jordan

enjoyed "immunity" from any claims of Dover or FCMH (R. 117-118); the Mississippi Tort Claims Act provided the exclusive rights and remedies to all concerned (R. 118-119); FCMH and its insurer (American States) had the "secondary" and "primary" responsibility, respectively, for any defense and "for the payment of any judgment" in favor of Dover (R. 119); the Mississippi Tort Claims Act prohibits a "governmental entity," such as FCMH, from seeking "contribution or indemnification" for an employee, such as Jordan, under these circumstances (R. 119-120); and the Mississippi Tort Claims Act specifically provides that it was not intended to "enlarge or otherwise adversely affect the personal liability of an employee of a governmental entity." (R. 120).

Farm Bureau further noted American States, pursuant to an insurance policy issued to FCMH, was "defending, and obligated to indemnify, FCMH in regard to the" claims of Dover. (R. 124). Therefore, Farm Bureau noted American States had the "primary" obligation over all others, pursuant to the Mississippi Tort Claims Act, to respond to the claims of Dover. (R. 125). Farm Bureau also set forth other clear arguments precisely demonstrating why the position of FCMH was (and still is) wholly inconsistent with both the language and the intent of the Mississippi Tort Claims Act. (R. 125-131).

D. Order of Final Judgment of the Trial Court

After FCMH responded to the cross-motion of Farm Bureau (R. 197-205), the trial court entered its Order of Final Judgment. (R. 206-208). The trial court appropriately noted Jordan "was an employee" of FCMH and was "acting within the course and scope of her employment" at the time of the accident. (R. 206). The trial court also correctly noted that FCMH had stipulated that Jordan "was in the course and scope of her employment" with FCMH at the time of the accident, and that

FCMH had agreed to the dismissal with prejudice "of all claims which were or could have been raised" against Jordan. (R. 207).

Further noting that FCMH had agreed, as to Jordan, that "no claim may be made against her, nor any Judgment rendered against her in her individual capacity", the trial court concluded that the order of dismissal, as to Jordan, "operated to fully and completely release her individual auto insurance carrier . . . from any and all responsibility or coverage." (R. 207). Also, the trial court noted Farm Bureau's contention that "it has no liability or responsibility due to this action being pursuant to the Mississippi Tort Claims Act . . . ." (R. 207).

Thus, the trial court entered a "summary and final judgment" in favor of Farm Bureau on the defense and indemnity demands of FCMH, also dismissing "with prejudice" the Complaint for Declaratory Judgment of FCMH. The Order of Final Judgment of the trial court was entered on December 21, 2006 (R. 206). FCMH timely noticed this appeal on January 18, 2007 (R. 209-211).

SUMMARY OF THE ARGUMENT

The Mississippi Legislature enacted the Mississippi Tort Claims Act as providing the exclusive rights and remedies in a case of this nature. It declared in clear terms that no governmental employee "shall be held personally liable" on claims governed by the Act, subject to exceptions not here relevant. It obligated the involved governmental entity for all liability under the Act, but authorized the involved governmental entity to transfer the "primary" responsibility for that liability to the chosen insurer of the governmental entity.

In and by the same Act, the Legislature prohibited the involved governmental entity from seeking or obtaining "contribution or indemnification, or reimbursement of legal fees and expenses"

from the involved employee of the governmental entity, again subject to exceptions not relevant here. It specifically dictated, by the Act, that nothing in the Act "shall enlarge or otherwise adversely affect the personal liability of an employee of a governmental entity." By the language and intent of the Mississippi Tort Claims Act, the Legislature made it clear that the Act, and any claim governed by it, was to have no financial impact on governmental employees. Yet, FCMH has acknowledged from the outset of this matter that the appellate relief it seeks would financially impact the governmental employee here at issue and all others similarly situated. For this and all the other reasons discussed herein by Farm Bureau, the trial court's judgment in favor of Farm Bureau should be affirmed. Any other result would require this Court ro rewrite the Mississippi Tort Claims Act.

ARGUMENT

A. The Trial Court Properly Entered Summary Judgment in Favor of Farm Bureau on the Improper Attempt of FCMH and American States to Shift the "Secondary" Responsibility of FCMH and the "Primary" Responsibility of American States to Farm Bureau, as the Liability Insurer of a Governmental Employee, Jordan, for a Claim Wholly Governed by the Mississippi Tort Claims Act.

All claims of Dover against FCMH were premised upon, and asserted only pursuant to, the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1, et seq., as amended. (R. 7-11). Jordan was dismissed from this action on the ground that "individual employees of public entities have immunity for acts alleged to have been committed in the course and scope of their employment under the Mississippi Tort Claims Act." (R. 1) By the dismissal Order, it was adjudicated, as agreed to by FCMH, that "no claim may be made against [Jordan], nor any Judgment rendered against [Jordan] in her individual capacity." (R. 1-2). As discussed herein, the same "immunity" principles dictating this proper result as to Jordan also extend to Farm Bureau as the liability insurer of Jordan.

FCMH always acknowledged that all claims of Dover against FCMH existed against FCMH only as a "public entity employer," pursuant to the "Mississippi Tort Claims Act, Section 11-46-1, et seq., of the Mississippi Code of 1972, as amended." (R. 133-134). To the extent that FCMH had liability to Dover, the liability of FCMH existed only as a result of the waiver of immunity accomplished by Miss. Code Ann. § 11-46-5, and "only to the extent of the maximum amount of liability provided for in Section 11-46-15." Miss. Code Ann. § 11-46-5(1). The Mississippi Tort Claims Act provided the exclusive remedy available to Dover against FCMH, and it is also exclusive as to any remedy available to FCMH against others:

> The remedy provided by this chapter against a governmental entity or its employee is exclusive of any other civil action or civil proceeding by reason of the same subject matter against the governmental entity or its employee or the estate of the employee for the act or omission which gave rise to the claim or suit; and any claim made or suit filed against a governmental entity or its employee to recover damages for any injury for which immunity has been waived under this chapter shall be brought only under the provisions of this chapter, notwithstanding the provisions of any other law to the contrary.

Miss. Code Ann. § 11-46-7(1).

By this language, the Legislature made the Act "exclusive of any other civil action or civil proceeding by reason of the same subject matter" against Jordan, and the Legislature specifically declared that "any claim made or suit filed against" Jordan "shall be brought only under the provisions of the Act, notwithstanding the provisions of any other law to the contrary." FCMH and this Court will search the Act in vain for any provision directly or by implication authorizing a governmental entity (or its insurer) to make defense and indemnity demands on an employee (or the liability insurer of an employee) of a governmental entity. Yet, the Act by language and intent clearly prohibits this and the result sought by FCMH on appeal.

The Mississippi Tort Claims Act provides that a governmental entity "employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee shall be held personally liable for acts or omissions occurring within the course and scope of the employee's duties." Miss. Code Ann. § 11-46-7(2) (emphasis added). This is a clear expression of Legislative intent that claims governed by the Act are not to have any financial impact on governmental employees.

In fact, pursuant to the Mississippi Tort Claims Act, "every governmental entity shall be responsible for providing a defense to its employees and for the payment of any judgment in any civil action or the settlement of any claim against an employee for money damages arising out of any act or omission within the course and scope of his employment . . . ." Miss. Code Ann. § 11-46-7(3). Again, the Legislative intent is clear that claims governed by the Act are not to have any financial impact on governmental employees.

The governmental entity, here FCMH, pursuant to § 11-46-7(3), originally had the defense and indemnity duty to Jordan. However, "to the extent that a governmental entity has in effect a . . . plan or policy of insurance and/or reserves which the board has approved as providing satisfactory security for the defense and protection of the political subdivision against all claims and suits for injury for which immunity has been waived under this chapter, the governmental entity's duty to indemnify and/or defend such claim on behalf of its employees shall be secondary to the obligation of such insurer or indemnitor, whose obligation shall be primary." Id. FCMH has such a "policy of insurance" as to all claims of Dover, through the policy issued to FCMH by American States, and

by the clear command of the statutory scheme that "policy of insurance" is "primary" as to all claims and liability at issue.

By the Act, American States had the "primary" responsibility for the claims of Dover, with the responsibility of FCMH being "secondary" to that "primary" responsibility. Both FCMH and American States had that responsibility "for the payment of any judgment . . . or the settlement of any claim" governed by the Act. The Act does not authorize, and in fact prohibits, FCMH and American States to shift their "secondary" and "primary" responsibility to Jordan, Farm Bureau or anyone else. Yet again, the language and intent of the Act prevents claims governed by the Act from financially impacting governmental employees, but this is the result FCMH acknowledges and seeks.

Additionally, pursuant to the Mississippi Tort Claims Act, a "governmental entity shall not be entitled to contribution or indemnification, or reimbursement for legal fees and expenses from its employee unless a court shall find that the act or omission of the employee was outside the course and scope of his employment." Miss. Code Ann. § 11-46-7(5). The present claims of FCMH fly in the face of this, quite clear, statutory prohibition. Since a governmental entity cannot obtain "contribution or indemnification" from an employee or reimbursement of "legal fees and expenses," unless the "employee was outside the course and scope of his employment," a situation not present here, logic dictates the statutory prohibition applies as well to the insurer of an employee of the governmental entity. And, the Mississippi Tort Claims Act specifically provides that "[n]othing in this chapter shall enlarge or otherwise adversely affect the personal liability of an employee of a governmental entity." Miss. Code Ann. § 11-46-7(8).

The financial impact on an employee of a governmental entity, with the result requested by FCMH, is conceded by FCMH (as discussed herein) and subject to judicial notice in any event. The

obvious and real impact is increased premiums, and the risk of loss of insurance coverage. As an insurer's risk increases, as this Court knows, so do the premiums paid by the insureds, and too many covered losses can (and do) result in loss of coverage. Yet, by the above-referenced provisions of the Act, the Legislature expressed its intent that claims governed by the Act are to have no financial impact on governmental employees. This will not be the result of a decision here in favor of FCMH.

In the light of the statutory framework, it is no wonder that the Attorney General of the State of Mississippi previously issued the opinions that are in the record. (R. 142). Those opinions and the authorities referred to therein demonstrate that the appellate contentions of FCMH have no merit, and that Farm Bureau had no duty to defend or indemnify FCMH in regard to the claims of Dover, as was properly adjudicated by the trial court.

As is made clear by the Attorney General opinion dated February 16, 1996, the statutory analysis set forth above by Farm Bureau was applied, for the most part, to reach the authority-supported conclusion that, since the Mississippi Tort Claims Act provides the exclusive remedy in this context, "no state employee's insurer should ever be liable to a plaintiff for injuries sustained as a result of the employee's negligence . . . ." (R. 144).

As this Court noted in *Mozingo v. Scharf,* 828 So. 2d 1246, P29 (Miss. 2002), the fact that an employee of a governmental entity possesses "liability insurance is irrelevant to the inquiry as to whether he enjoys immunity under the MTCA." In fact, *Mozingo* notes with approval the Attorney General opinion quoted above (governmental employee's personal policy is not subject to exposure for injuries resulting from torts committed during the course and scope of employment), and states the "MTCA precludes personal liability by the individual employee, and the existence of a personal insurance policy is not relevant" in actions governed by the Mississippi Tort Claims Act. Id., P33.

The Mississippi Tort Claims Act is a carefully crafted statutory scheme. Nothing in the Act suggests that a governmental entity, such as FCMH, or its insurer, such as American States, can shift or transfer the statutory liability created by the Act to an immune employee or the insurer of an immune employee, although such is precisely the result sought on appeal by FCMH. Rather, the Mississippi Tort Claims Act provides the "exclusive" rights and remedies in this context, and expressly provides that an employee of a governmental entity shall not be "held personally liable for acts or omissions occurring within the course and scope of the employee's duties." Miss. Code Ann. §§ 11-46-7(1) and (2). As properly determined and stated by this Court in *Mozingo*, the existence of personal insurance in favor of an employee of a governmental entity is simply "not relevant" in an action of this nature. *Mozingo*, 828 So. 2d 1246, P33.

Indeed, the Act obligates the involved governmental entity to defend its employees and "for the payment of any judgment in any civil action or the settlement of any claim against an employee for money damages arising out of any act or omission within the course and scope of his employment. . . ." Miss. Code Ann. § 11-46-7(3). This obligation may be transferred to the insurer of the governmental entity "to the extent that a governmental entity has in effect . . . a plan or policy of insurance and/or reserves which the board has approved as providing satisfactory security for the defense and protection of the political subdivision against all claims and suits for injury for which immunity has been waived under [the MTCA]," and in such a circumstance the governmental entity's indemnification and defense duty becomes "secondary to the obligation of [the governmental entity's] insurer or indemnitor, whose obligation shall be primary." Miss. Code Ann. § 11-46-7(3) (emphasis added). Thus, the Act itself declares the "secondary" and the "primary" obligation for

claims of the type here at issue, and the "primary" obligation in this instance rests with American States, as the insurer of FCMH.

And quite clearly, pursuant to the Mississippi Tort Claims Act, no governmental entity can be "entitled to contribution or indemnification, or reimbursement for legal fees and expenses from its employee unless a court shall find that the act or omission of the employee was outside the course and scope of his employment." Miss. Code Ann. § 11-46-7(5). Important as well is the fact that the Mississippi Tort Claims Act specifically provides that "[n]othing in this chapter shall enlarge or otherwise adversely affect the personal liability of an employee of a governmental entity." Miss. Code Ann. § 11-46-7(8).

In the above regard, FCMH always acknowledged that a decision in its favor would impact Jordan, "as her coverage is implicated . . . such that her future coverage for claims of a like nature, as well as her premiums for future automobile liability coverage, may be affected as well" by the outcome of the claims of FCMH against Farm Bureau. (R. 44) While obviously the Mississippi Legislature in enacting the Act placed all liability and responsibility to injured parties, to the extent allowed by the Act, on the governmental entity at issue, or the insurer of the governmental entity with the "primary" obligation when the governmental entity has (as here) secured insurance, it likewise specifically dictated that nothing in the Act would "enlarge or otherwise adversely affect the personal liability of an employee of a governmental entity." Miss. Code Ann. § 11-46-7(8). Quite naturally, since the governmental entity employee is to have no adverse impact due to claims governed by the Act, no adverse impact should be visited on the insurer of such an employee.

Yet, if the arguments of FCMH against Farm Bureau prevail, as FCMH concedes, all governmental employees, in the same position as Jordan, would have their "personal liability" and

financial position impacted by underwriting decisions and premiums increases, which was clearly not intended by, and is in fact prohibited by, the Act. As this Court held in *Mozingo*, the "MTCA precludes personal liability by the individual employee, and the existence of a personal insurance policy is not relevant" in actions governed by the Act. *Mozingo,* 828 So. 2d 1246, P33 (emphasis added).

In the record is a copy of the insurance policy issued to FCMH by American States, pursuant to which American States defended and indemnified FCMH in regard to the claims of Dover. (R. 158-196). The American States policy provides for a $300,000 limit of liability. (R. 161). It extends coverage to automobiles FCMH does not "own, lease, hire, rent or borrow that are used in connection with" the business of FCMH. (R. 161 and 173). It obligated American States, pursuant to the insuring agreement of the liability coverage, to defend and indemnify FCMH with regard to the claims of Dover. (R. 174). This policy of insurance issued to the governmental entity at issue, FCMH, is "primary," and American States always had the "primary" obligation over all others to respond to the claims of Dover. Miss. Code Ann. § 11-46-7(3). Otherwise, FCMH would have the "secondary" obligation, if any, to Dover. Miss. Code Ann. § 11-46-7(3). But in no event can the responsibility for the claims at issue be transferred to Jordan or Farm Bureau without rendering wholly meaningless both the language and intent of the Act and the Legislature.

Against all of this, FCMH relies on a definition of "INSURED" in the Farm Bureau policy, taken out of context, to argue that Farm Bureau, wholly inconsistent with the language and intent of the Act, somehow had the duty to defend and indemnify FCMH in regard to its Mississippi Tort Claims Act liability to Dover. As FCMH suggests, as part of the definition of "INSURED," the Farm Bureau policy does provide:

> Under Coverages A (bodily injury) and B (property damage), the unqualified word "Insured" means the named Insured and, if the named Insured is an individual, his spouse, and also any person while using the Automobile and any person or organization legally responsible for its use, provided the actual use of the Automobile is by the named Insured or spouse or with the permission of either. . . .

Appellant's Brief at 2.

The coverage argument of FCMH fails, in part, as any liability of FCMH to Dover, pursuant to the Mississippi Tort Claims Act, was liability for the acts or omissions of Jordan, while in the course and scope of her employment with FCMH, and not responsibility or liability for the "use" of the automobile insured by Farm Bureau. The liability of FCMH to Dover did not result from FCMH being "legally responsible" for the "use" of the vehicle insured by Farm Bureau, but rather such liability, pursuant to the Mississippi Tort Claims Act, was statutorily imposed as a result of the relationship between FCMH and Jordan. In any event, the obligation of American States to FCMH, through the policy issued to FCMH by American States, was the "primary" obligation, as a matter of law, pursuant to Miss. Code Ann. § 11- 46-7(3).

Also, the curious result sought by FCMH - insurance protection for a non-party to the insurance policy at issue while the person purchasing the policy is immune and needs no protection at all - runs afoul of the rule that a "third party [to a contract] cannot say that the legal effect of a contract between two other parties [is] different from that intended by the two parties unless the third party can show that the contract was made for his or her benefit." *Wright v. Quesnel*, 876 So. 2d 362 (P6) (Miss. 2004), citing *Burns v. Washington Savings*, 251 Miss. 789, 171 So. 2d 322, 324 (1965). Moreover, "when dealing with a contract of insurance, the Court must inquire into what the parties thereto meant" and "[p]ractical considerations must be given play, interpreted in the light of the

purpose of the policy provision." *Thompson v. Mississippi Farm Bureau Mutual Insurance Company*, 602 So. 2d 855, 858 (Miss. 1992), quoting *Fleming v. Travelers Ins. Co.*, 206 Miss. 284, 39 So. 2d 885, 887 (1949). FCMH has submitted nothing to show the Farm Bureau policy "was made for [its] benefit," and practicality would control, but the Act overrides all claims and makes FCMH and American States solely responsible for the claims and liability at issue.

Moreover, in response to the claims of FCMH, Farm Bureau lodged a number of defenses. Farm Bureau contended "FCMH lacks standing to maintain or to attempt to maintain the claims attempted to be stated in the Complaint." (R. 47). Obviously, with American States having the contractual duty to defend and indemnify FCMH, pursuant to the policy issued to FCMH by American States, American States would be the real party in interest in regard to any claims against Farm Bureau, although Farm Bureau submits, for the reasons set forth herein, that FCMH (and American States) have no claim at all against Farm Bureau. The same circumstances and considerations resulted in Farm Bureau's contention that "FCMH has failed to join a necessary or indispensable party, or necessary or indispensable parties, or a party or parties needed for a just adjudication, and FCMH should be required to join said party or parties pursuant to Rules 17 and 19 of the Mississippi Rules of Civil Procedure." (R. 48). American States is truly the party in interest with regard to this appeal as it is "primary."

Farm Bureau further asserted, in response to the claims of FCMH, that the "liability, if any, of FCMH as to the matter or matters at issue arises from and flows through the Mississippi Tort Claims Act" and that, as a result, "Farm Bureau does not owe any duty to defend or indemnify FCMH as to the matter or matters at issue." This defense of Farm Bureau, along with Farm Bureau's additional defense that "Farm Bureau's relevant insured and Farm Bureau are immune from any

liability on the claim or claims attempted to be stated by FCMH" (R. 52), all result from the statutory analysis set forth, and as well the authorities discussed, above. The same statutory analysis also resulted in the contention of Farm Bureau that the "Mississippi Tort Claims Act prohibits the claims attempted to be stated by FCMH against Farm Bureau." (R. 52). And the authorities referred to above prove these points beyond any doubt, as the existence, in a case governed by the MTCA, of a personal policy of insurance in favor of an employee of a governmental entity, such as the insurance policy Farm Bureau issued to Jordan, "is not relevant." *Mozingo*, 828 So. 2d 1246, P33.

FCMH would have this Court rule that Farm Bureau is ignoring the language of its own policy. However, Farm Bureau's reliance is upon the language and intent of the MTCA, the above authorities, the fact that this Court has held "not relevant" the existence of personal insurance in favor of a governmental employee in this context, logic and practicality, and the fact (as noted above) that the liability of FCMH to Dover was based on statute and the relationship between FCMH and Jordan, not the "use" of the vehicle Farm Bureau insured.

FCMH would also have this Court rule that the extension of the insured status to "any person or organization legally responsible for . . . use" of the vehicle insured by the Farm Bureau policy somehow overrides the "primary" obligation of American States, and the "secondary" obligation of FCMH, for the claims of Dover under the Mississippi Tort Claims Act. Yet, as noted, the "use" of that vehicle did not give rise to the liability of FCMH, but rather the statutory scheme and the relationship between FCMH and Jordan established and controlled any liability of FCMH.

Also, the Farm Bureau policy shows it is an agreement with Jordan, not FCMH. (R. 98 and 100). The relevant insuring agreement extends to "sums which the Insured shall become legally obligated to pay as damages" for certain forms of bodily injury or property damage that is "caused

by automobile accident" and arises "out of the ownership, maintenance or use" of the insured automobile. (R. 100). Yet, the liability here at issue of FCMH, or more properly American States, was statutory liability resulting from the limited waiver of immunity accomplished by the Mississippi Tort Claims Act. Such is not legal liability of the type contemplated by the Farm Bureau policy, nor does such liability result from the "use" of any automobile, as discussed above.

And even if the Farm Bureau policy could apply as suggested by FCMH, the "Other Insurance" provisions of the Farm Bureau policy would have to be taken into account in light of the "primary" coverage provided by the American States policy. (R. 105). Yet, for all of the reasons discussed above, the Farm Bureau policy extends no coverage to FCMH for the subject claims and is, as a matter of law, "not relevant" for present purposes under *Mozingo.*

For all of the above reasons, the trial court properly rejected the improper attempt of FCMH and American States to shift their "secondary" and "primary" responsibility for the claim of Dover to Farm Bureau, as the liability insurer of Jordan. Any other result would be wholly contrary to the Legislative intent, expressed throughout the Act, that claims governed by the Act shall have no financial impact on governmental employees. Thus, the summary judgment in favor of Farm Bureau should be affirmed. This Court knows, and FCMH concedes, that if Farm Bureau has responsibility in this context, Jordan and all other similarly situated governmental employees will be financially impacted. And this is against the language and intent of the Act.

B. Reply to Arguments of FCMH

FCMH still relies on a single provision of the Farm Bureau policy to support the argument that FCMH and its insurer, American States, can transfer to Farm Bureau their statutorily imposed "secondary" and "primary" responsibility for the claims of Dover. Brief of FCMH at 2. It criticizes as "clear error" the trial court ruling in favor of Farm Bureau (Brief of FCMH at 3), while acknowledging appropriately that this Court's review is *de novo* (Brief of FCMH at 3-4).

On *de novo* review, the issue for this Court is whether the Act precludes the relief sought by FCMH (or more appropriately American States), without regard to the terms and provisions of the private insurance contract between Jordan and Farm Bureau. FCMH does not (as it cannot) explain how the relief it seeks accords with the language and intent of the Act. It has always acknowledged that a decision in its favor would financially impact Jordan (and all other similarly situated governmental employees), and Farm Bureau has already shown this is clearly contrary to the language and intent of the Act and the Legislature.

FCMH relies upon cases and authorities discussing the Federal Tort Claims Act (Brief of FCMH at 5-7), not the Mississippi Tort Claims Act, but here the governing Act places the "primary" responsibility for the subject claims on American States and the "secondary" responsibility therefor on FCMH, not Jordan or Farm Bureau. And it is the fact that Jordan was "in the course and scope of her employment" with FCMH that shields her and her contractual indemnitor, Farm Bureau, from any liability for the claims of Dover, as is expressly dictated by the Act.

Contrary to the suggestion of FCMH (Brief of FCMH at 7), the liability of FCMH to Dover (as determined by the trial court) was not because FCMH was an "organization legally responsible" for the vehicle Jordan was driving. Rather, the liability of FCMH to Dover was a result of the

immunity waiver accomplished by the Act. And since FCMH is prohibited by the Act from seeking "contribution or indemnification, or reimbursement for legal fees and expenses" from Jordan, because of the "primary" and "secondary" responsibility for the claims of Dover placed on American States and FCMH by the Act, it follows quite naturally that FCMH and American States cannot seek "contribution or indemnification, or reimbursement for legal fees and expenses" from Farm Bureau, as merely the contractual indemnitor of Jordan.

FCMH argues Farm Bureau should owe the same duty to it as Farm Bureau would owe to Jordan. (Brief of FCMH at 7). Farm Bureau owes no duty or obligation to its insured, Jordan, in this case because she is immune from any liability to Dover and because, by the Act, American States has the "primary" responsibility for all claims of Dover, with FCMH having the "secondary" responsibility for the claims of Dover. The invocation of equitable principles by FCMH relative to the "right to indemnity" and primary and secondary liability (Brief of FCMH at 7) is strange indeed since, by the Act, the "primary" and "secondary" obligation for all claims of Dover rests with American States and FCMH, respectively.

Moreover, FCMH purchased no insurance from Farm Bureau applicable to this case, but it did purchase and obtain insurance from American States consistent with the Act. See Brief of FCMH at 8. Further, Farm Bureau needs no exclusion, as suggested by FCMH (Brief of FCMH at 9), to be shielded from liability of a contractual nature in this case, because the Act dictates the rights and responsibilities of all concerned, and the Act itself shields Farm Bureau and Jordan from liability to Dover, FCMH and/or American States.

FCMH next criticizes unnecessarily the opinion of the trial court. Brief of FCMH at 9-14. Since this Court's review is *de novo*, the reasoning expressed by the trial court, right or wrong, is no

barrier to affirmance on appeal of the correct result reached by the trial court, all as dictated by the language and intent of the Mississippi Tort Claims Act and, as well, this Court's pronouncements in *Mozingo.*

CONCLUSION

The duty of this Court is to "interpret the statutes enacted by the Legislature, and to neither broaden nor restrict the legislative act." *Miss. Dept. of Transp. v. Allred*, 928 So. 2d 152, 156 (Miss. 2006). For the reasons discussed above, this Court would have to "broaden" the rights and remedies available to FCMH under the Mississippi Tort Claims Act to grant FCMH relief on appeal. This Court would also have to expose governmental employees to financial implications the Legislature took great care to avoid. The Legislature has already denied to FCMH the relief it seeks. The Mississippi Tort Claims Act commands affirmance of the trial court result.

Respectfully submitted,

APPELLEE MISSISSIPPI FARM BUREAU MUTUAL INSURANCE COMPANY

BY: _____
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CERTIFICATE OF SERVICE

I, Sam S. Thomas, do hereby certify that I have mailed via United States Mail, postage fully prepaid, a true and correct copy of the above and foregoing document to the following:

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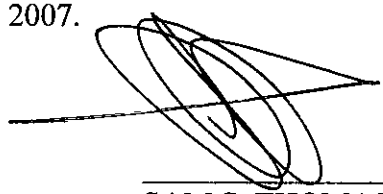
THIS, the 25th day of July, 2007.



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