IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

FRANKLIN COUNTY MEMORIAL HOSPITAL — APPELLANT

V. — CAUSE NO. 2007 - TS - 00142

MISSISSIPPI FARM BUREAU MUTUAL INSURANCE COMPANY — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF FRANKLIN COUNTY, MISSISSIPPI
CIVIL ACTION NO. 04-CV013

BRIEF OF APPELLANT

FRANKLIN COUNTY MEMORIAL HOSPITAL

ORAL ARGUMENT REQUESTED

TIMOTHY D. CRAWLEY/ MS. Bar No. [redacted]
ROBERT L. GRANT/MS Bar No. [redacted]
ANDERSON CRAWLEY & BURKE, PLLC
ATTORNEYS AND COUNSELORS
POST OFFICE BOX 2540
RIDGELAND, MS 39158-2540
TELEPHONE: (601) 977-8977
FACSIMILE:(601) 977-9975
E-MAIL: T.CRAWLEY@ACBLAW.COM
R.GRANT@ACBLAW.COM

LANE B. REED/MS. Bar No. [redacted]
McGEHEE McGEHEE & TOREY
POST OFFICE BOX 188
MEADVILLE, MS 39653
TELEPHONE: (601) 384-2343
E-MAIL: MMTLAW@MMTLAW.NET

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

FRANKLIN COUNTY MEMORIAL HOSPITAL — APPELLANT

V. — CAUSE NO. 2007 - TS - 00142

MISSISSIPPI FARM BUREAU MUTUAL INSURANCE COMPANY — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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

1. Boyce Dover
2. Sydneye Marie Jordan
3. Franklin County Memorial Hospital, Appellant
4. Mississippi Farm Bureau Mutual Insurance Company, Appellee
5. Sam S. Thomas, Esq., Attorney for Appellee, Mississippi Farm Bureau Mutual Insurance Company
6. J. Randal Wallace, Jr. Esq., Attorney for Boyce Dover
7. Lane B. Reed, Esq., Attorney for Appellant, Franklin County Memorial Hospital
8. Timothy D. Crawley, Esq., Attorney for Appellant, Franklin County Memorial Hospital
9. Robert L. Grant, Esq., Attorney for Appellant, Franklin County Memorial Hospital
10. Honorable Forrest A. Johnson, Franklin County Circuit Court Judge

Respectfully submitted, this the 21st day of May, 2007.

FRANKLIN COUNTY MEMORIAL HOSPITAL

By: ANDERSON CRAWLEY & BURKE, PLLC

By: _____
TIMOTHY D. CRAWLEY
ROBERT L. GRANT

ANDERSON CRAWLEY & BURKE, PLLC
TIMOTHY D. CRAWLEY/ MS. Bar No.7826
ROBERT L. GRANT/MS Bar No.10852
ATTORNEYS AND COUNSELORS
POST OFFICE BOX 2540
RIDGELAND, MS 39158-2540
TELEPHONE: (601) 977-8977
FACSIMILE:(601) 977-9975
E-MAIL: T.CRAWLEY@ACBLAW.COM
R.GRANT@ACBLAW.COM

LANE B. REED/MS. Bar No. 10002
McGEHEE McGEHEE & TOREY
POST OFFICE BOX 188
MEADVILLE, MS 39653
TELEPHONE: (601) 384-2343
E-MAIL: MMTLAW@MMTLAW.NET

TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED PERSONS ..... -i-

TABLE OF CONTENTS ..... -iii-

TABLE OF AUTHORITIES ..... -v-

STATEMENT OF THE ISSUES 1

I. Whether the trial court erred in denying the Motion for Partial Summary Judgment of Franklin County Memorial Hospital and in entering its Order of Final Judgment in favor of Mississippi Farm Bureau Mutual Insurance Company 1

II. Whether Mississippi Farm Bureau Mutual Insurance Company owes automobile insurance coverage to Franklin County Memorial Hospital as an "insured" resulting from the claim of the Plaintiff, Boyce Dover, pursuant to applicable policy language. 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 2

SUMMARY OF THE ARGUMENT 3

STANDARD OF REVIEW 3

ARGUMENT 4

I. Franklin County Memorial Hospital is an "insured" under the definition of the term in the policy of automobile insurance issued by Mississippi Farm Bureau Mutual Insurance Company to Sydneye Marie Jordan. 4

II. As an "insured", Franklin County Memorial Hospital is entitled to all coverage provided by said policy of insurance 7

III. The fact that Franklin County Memorial Hospital is a "public entity" as defined by §15-46-1, et seq., of the "Mississippi Tort Claims Act", does not affect the insurance policy's definition including Franklin County Memorial Hospital as an "insured." 8

IV. The Order of Final Judgment of the Circuit Court was in error in holding that the dismissal of Jordan from this litigation served to act as a release on Jordan's insurance carrier, Farm Bureau 9

CONCLUSION 15

CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

CASES: **PAGE(S)**

C. E. Tucker v. Hinds County, Mississippi Power & Light Co.,
558 So.2d 869, 872 (Miss. 1990) 3

Farmland Mut. Ins. Co. v. Scruggs,
886 So.2d 714, 717 (Miss. 2004) 4

Grange Mut. Cas. Co. v. U.S. Fidelity & Guar. Co.,
853 So.2d 1187 (Miss. 2003) 7

Harthcock v. State Farm Mutual Automobile Insurance Co., et al.,
248 So.2d 456 (Miss. 1971) 13

Indiana Lumbermen's Mutual Insurance Co. v. Curtis Mathes Mfg. Co.,
456 So.2d 750, 754 (Miss. 1984) 14

J & J Timber Co. v. Broome,
932 So.2d 1 (Miss. 2006) 11, 12

L. W. v. McComb Separate Municipal School Dist.,
754 So.2d 1136, 1144 (Miss. 1999) 8

Miller v. Meeks,
762 So.2d 302, 304 (Miss. 2000) 4

Moeller v. American Guar. And Liability Ins. Co.,
707 So.2d 1062 (Miss. 1996) 7

Radmann v. Truck Ins. Exchange,
660 So.2d 975, 977 (Miss. 1995) 4

Reid v. United States,
558 F.Supp. 686, 688 (N.D.Miss. 1983) 7

Thompson v. Aetna Insurance Co.,
245 So.2d 206 (Miss. 1971) 13

UHS Qualicare, Inc. v. GulfCoast Community Hospital, Inc.,
525 So.2d 746, 754 (Miss. 1987) 3

United States v. Myers,
363 F.2d 615 (5th Cir. 1966) 5, 6, 8, 9

W. J. Runyon & Son, Inc. v. Davis,
605 So.2d 38 (Miss. 1992) 11

OTHER AUTHORITIES:

Rule 57, Miss. R. Civ. P. 3

Miss. Code Ann. §11-46-1 2

Miss. Code Ann. §11-46-7(2) 10

Miss. Code Ann. §11-46-17(4) 8

Couch on Insurance, §111.42 6

STATEMENT OF ISSUES

I. **WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION FOR PARTIAL SUMMARY JUDGMENT OF FRANKLIN COUNTY MEMORIAL HOSPITAL AND IN ENTERING ITS ORDER OF FINAL JUDGMENT IN FAVOR OF MISSISSIPPI FARM BUREAU MUTUAL INSURANCE COMPANY.**

II. **WHETHER MISSISSIPPI FARM BUREAU MUTUAL INSURANCE COMPANY OWES AUTOMOBILE INSURANCE COVERAGE TO FRANKLIN COUNTY MEMORIAL HOSPITAL AS AN "INSURED" RESULTING FROM THE CLAIM OF THE PLAINTIFF, BOYCE DOVER, PURSUANT TO APPLICABLE POLICY LANGUAGE.**

STATEMENT OF THE CASE

On or about October 31, 2003, Boyce Dover filed suit against Franklin County Memorial Hospital (hereinafter 'Franklin'), and an employee of Franklin, Sydneye Marie Jordan, regarding a June 14, 2002, automobile accident between Boyce Dover and Jordan. Franklin filed an Answer and on or about February 10, 2005, filed a Declaratory Judgment action against Mississippi Farm Bureau Mutual Insurance Company, (hereinafter 'Farm Bureau'). On or about July 8, 2005, Franklin filed a motion for Partial Summary Judgment requesting that Farm Bureau defend and indemnify Franklin pursuant to the terms and conditions of the automobile insurance policy issued by Farm Bureau to Jordan.

This matter proceeded to trial on or about May 23, 2006, and on June 29, 2006, the Circuit Court of Franklin County issued Findings of Fact and Conclusions of Law awarding a judgment to Mr. Dover in the amount of $49,500.00 against Franklin. Said Judgment was satisfied by Franklin. Subsequently, on or about December 21, 2006, the Circuit Court issued its Order of Final Judgment denying Franklin's Motion for Partial Summary Judgment and finding in favor of Farm Bureau.

STATEMENT OF THE FACTS

The basic facts of this case remain largely undisputed. On June 14, 2002, Ms. Jordan was operating her personal vehicle in the parking lot of the Wal-Mart in Natchez, Mississippi. Ms. Jordan was running an errand on behalf of her employer, Franklin, and was admittedly in the course and scope of her employment. (R. at 206). The Plaintiff, Boyce Dover, alleged in his Complaint that he was standing in a marked crosswalk when he was struck and injured by Ms. Jordan's vehicle. (R at 67). Subsequent to the filing of his Complaint, the Plaintiff dismissed his claims against Ms. Jordan in her individual capacity, and continued his suit against her employer, Franklin, pursuant to the Mississippi Tort Claims Act, §11-46-1, *et seq.*, of the Mississippi Code of 1972, as amended. (R. at 71).

On February 11, 2005, Franklin filed its Complaint for Declaratory Judgment praying that Farm Bureau be ordered to defend and indemnify Franklin under its policy of automobile insurance, number A 0563971, Farm Bureau issued to Ms. Jordan and in effect on the date of the accident. (R at 78).

The request for defense and indemnification arose from the policy of insurance issued by Farm Bureau to Ms. Jordan, which stated in part:

> IV. DEFINITION OF INSURED
> Under Coverages A and B, the unqualified word **"Insured"** means the named Insured and, ...also any person while using the **Automobile** and any person or organization legally responsible for its use, ... See Automobile Policy, p. 4, § IV. (R. at 101).

Franklin's Motion for Partial Summary Judgment was heard and taken under advisement by the Trial Court. The case then proceeded to trial on the merits. At the conclusion of the trial, Franklin and Farm Bureau agreed to jointly satisfy the Judgment as to Mr. Dover and reimburse as appropriate once the coverage issue was decided. Said Motion and request for defense and

indemnification was denied by Order of the Circuit Court of Franklin County on December 21, 2006. (R. at 206 - 208).

SUMMARY OF THE ARGUMENT

Under the clear and unambiguous terms of the policy of insurance issued by Farm Bureau to Ms. Jordan, Franklin qualifies as an "organization legally responsible" for the subject vehicle such that Franklin is an "insured" under the policy. As such, Farm Bureau owed a duty to defend and indemnify Franklin against Dover's claims. The finding of the Trial Court that the dismissal of Jordan in her individual capacity served as a release of her automobile insurance carrier, Farm Bureau, was not supported by the language of the Order of Dismissal, and was clear error.

STANDARD OF REVIEW

Franklin requested Declaratory Judgment in this cause pursuant to Miss. Rule of Civil Procedure, Rule 57, and requested that the Circuit Court issue an Order finding that by the clear terms of the insurance contract in place, Farm Bureau owed a duty to defend and indemnify Franklin. In the Order of Final Judgment issued by the Circuit Court, Franklin's petition for Declaratory Judgment was denied and Summary Judgment granted in favor of Farm Bureau.

The Supreme Court has stated that "...declaratory judgment sets out the law and is binding as to the rights of parties. The issue in the declaratory judgment before us involves questions of law. It is a well-settled principle that the supreme court is the ultimate expositor of the law of this State. UHS Qualicare, Inc. v. GulfCoast Community Hospital, Inc., 525 So.2d 746, 754 (Miss.1987). "Therefore, this Court, as an appellate court, conducts a *de novo* review on questions of law." *Id.*; C.E. Tucker v. Hinds County, Mississippi Power & Light Co., 558 So.2d 869, 872 (Miss.1990). Also, "the proper construction of an insurance contract provision

is a question of law which we review de novo." Radmann v. Truck Ins. Exchange, 660 So.2d 975, 977 (Miss.1995). We review a trial court's grant of a summary judgment motion de novo as well. Miller v. Meeks, 762 So.2d 302, 304 (Miss.2000). "We have long held that when a contract is clear and unambiguous to its wording, its meaning and effect are matters of law." Farmland Mut. Ins. Co. v. Scruggs, 886 So.2d 714 , 717(Miss. 2004).

ARGUMENT

I. FRANKLIN MEMORIAL HOSPITAL IS AN "INSURED" UNDER THE DEFINITION OF THE TERM IN THE POLICY OF AUTOMOBILE INSURANCE ISSUED BY MISSISSIPPI FARM BUREAU MUTUAL INSURANCE COMPANY TO SYDNEYE MARIE JORDAN.

It is undisputed that when the vehicle of Ms. Jordan struck Mr. Dover on June 14, 2002, Ms. Jordan was in the course and scope of her employment with Franklin County Memorial Hospital. It is also undisputed that Ms. Jordan's vehicle was insured under a policy of insurance issued by Farm Bureau. That policy stated in pertinent part:

> IV. DEFINITIONS OF INSURED
> Under Coverages A and B, the unqualified word "**Insured**" means the named Insured and, ...also any person while using the **Automobile** and any person or organization legally responsible for its use, ... See Automobile Policy, p. 4, § IV.

When Franklin requested Declaratory Judgment from the Circuit Court, the only principal issue before the Court was the question of whether Franklin qualified as an "organization legally responsible" for the use of Ms. Jordan's vehicle. It is undisputed that Franklin was vicariously liable for negligence committed by Ms. Jordan while in the course and scope of her employment. The issue, then, is does the fact that Franklin was vicariously liable for Jordan render Franklin an "organization legally responsible" for the use of her vehicle?

The answer lies in the case of United States v. Myers, 363 F.2d 615 (5th Cir. 1966). In that case, a Federal employee was operating his own vehicle in the course and scope of his employment when he was involved in an automobile accident. The United States sought to recover from the employee's insurer, on the grounds that the United States Government was an "organization legally responsible" sufficient to entitle the United States to claim "insured" status under the policy. The Fifth Circuit made it abundantly clear that the "organization legally responsible" language from the insurance contract has been repeatedly interpreted as including employers in situations where the insured auto is being used in the course and scope of employment.

> In very plain language [the employee's] policy insures any 'person or organization legally responsible for the use' of the insured automobile. The only question in the court below was, and in this court is, whether the United States may qualify as an additional 'insured' under this language. And we are convinced that this no longer is a question to be answered by applying the usual rules of contract construction. On the contrary, an unbroken line of cases presenting this very question and involving the same or very similar contract language, has definitively answered the question in favor of the United States.
> Citing To:
> Government Employees Ins. Co. v. United States, 349 F.2d 83 (10th Cir. 1965), cert. denied 382 U.S. 1026, 86 S.Ct. 646, 15 L.Ed.2d 539 (1966); Adams v. United States, 241 F.Supp. 383 (S.D.Ill.1965); Purcell v. United States, 242 F.Supp. 789 (D.Minn.1965); United States v. State Farm Mut. Auto. Ins. Co., 245 F.Supp. 58 (D.Ore.1965); Barker v. United States, 233 F.Supp. 455 (N.D.Ga.1964); Gahagan v. State Farm Mut. Auto. Ins. Co., 233 F.Supp. 171 (W.D.La.1964); Nistehdirk v. United States, 225 F.Supp. 884 (W.D.Mo.1964); McCrary v. United States, 235 F.Supp. 33 (E.D.Tenn.1964); Patterson v. United States, 233 F.Supp. 447; Vaughn v. United States, 225 F.Supp. 890 (E.D.Tenn.1964); Nistendirk v. McGee, 225 F.Supp. 883 (W.D.Mo.1963); Irvin v. United States, 148 F.Supp. 25 (D.S.D.1957); Rowley v. United States, 140 F.Supp. 295 (D.Utah 1956). See also the following unreported cases; Percivill v. United States, Civil No. 1454, W.D.Tex., March 1, 1966; United States v.

> National Ins. Underwriters, Civil No. 3549(J), S.D.Miss., July 7, 1965; Blagg v. United States, Civil No. 1768, W.D.Ark., April 16, 1964; Town v. United States, No. 64-577-JWC, S.D.Cal., Oct. 30, 1964; Chatham v. Hunt, Civil No. 1972, M.D.Ga., Dec. 30, 1964; Schuessler v. United States, Civil No. 5250, E.D.Ill., June 12, 1964; Devenport v. United States, Civil, No. 6-1533-C, S.D.Iowa, Oct. 13, 1964; Gabriel v. United States, Civil No. 64-C-3-D, W.D.Va.,; Helms v. United States, Civil Nos. 1735 and 1736, W.D.N.C., Aug. , 1963.

United States v. Myers, 363 F.2d 615,618 (5th Cir. 1966).

The Court went on to say that "It would indeed be difficult to conceive of a situation in which the meaning of disputed language was more firmly and finally decided, and where 'interpretation' as such was so unnecessary." *Id.*

Also, please see *Couch on Insurance*, §111.42:

> § 111:42. Employment relationship
> Pursuant to the application of the common law theory of respondent superior, an employer is generally held to be vicariously "legally responsible" for its employees' negligent driving. The employer is thus an omnibus insured under the terms of the policy covering the vehicle being driven by the employee. This principle will only have application when the vehicle is driven during the course of the employee's employment within the scope of the permission given by the employer.

As a result, it should be clear that there is more than ample authority to support the Rule that an employer is deemed to be an "organization legally responsible" and therefore an "insured" where the employee is involved in an accident with the insured auto while in the course and scope of her employment.

In the case at hand, just as in Myers above, Ms. Jordan was admittedly in the course and scope of her employment when she struck Mr. Dover. As a result, the organization legally responsible for Ms. Jordan's negligence, her employer, was vicariously liable for Ms. Jordan's actions and required to pay a judgment in excess of $49,500 as well as defense costs. It should

be apparent that the clear and unambiguous terms of the policy require that Farm Bureau indemnify Franklin in this cause.

II. AS AN "INSURED", FRANKLIN COUNTY MEMORIAL HOSPITAL IS ENTITLED TO ALL COVERAGE PROVIDED BY SAID POLICY OF INSURANCE.

When the named insured, Ms. Jordan, was involved in an auto-related accident in the course and scope of her employment, her employer, Franklin, became an "organization legally responsible" for the vehicle. As an "insured" Franklin was entitled to full coverage as set out in the policy. Specifically, after Franklin was required to pay a judgment in the amount of $49,500.00 on behalf of its employee, Franklin was entitled to be indemnified by Farm Bureau.

The fact that Franklin, as an "insured" under the policy, was entitled to coverage by Farm Bureau should be self-evident. That Farm Bureau owed the same duty to Franklin as to Ms. Jordan should be equally apparent. The Mississippi Supreme Court has unambiguously found that an automobile insurer owes the same duty to a named insured as to an unnamed party to the insurance contract. Grange Mut. Cas. Co. v. U.S. Fidelity & Guar. Co., 853 So.2d 1187 (Miss. 2003).

That duty includes the right of indemnification. "A right to indemnity arises when one party is exposed to liability by the action of another, who, in equity or in law, should make good the other's loss. It is also equally clear that where one party has been required to discharge a claim for which he is only secondarily liable, he may compel indemnity from the person primarily liable for the obligation giving rise to the claim." Reid v. United States, 558 F.Supp. 686, 688 (N.D.Miss.1983). Finally, "When an insured under a liability insurance policy is sued, the insurance company is contractually obligated to pay up to the limits of the policy all sums the insured becomes legally obligated to pay." Moeller v. American Guar. and Liability Ins. Co.,

707 So.2d 1062 (Miss.1996).

Thus, it is clear, that Franklin, as an "insured" under the definition of "insured" as stated in the policy of insurance, is entitled to coverage from Farm Bureau, and specifically entitled to indemnification on the judgment paid by Franklin on behalf of Ms. Jordan.

III. THE FACT THAT FRANKLIN COUNTY MEMORIAL HOSPITAL IS A "PUBLIC ENTITY" AS DEFINED BY §11-46-1, ET SEQ., OF THE "MISSISSIPPI TORT CLAIMS ACT", DOES NOT EFFECT THE INSURANCE POLICY'S DEFINITION INCLUDING FRANKLIN COUNTY MEMORIAL HOSPITAL AS AN "INSURED".

The Mississippi Tort Claims Act, Miss. Code Ann. §11-46-1 et seq. does not contain any language which could be construed as limiting the right of a "public entity" to be an "insured" under a policy of insurance. In fact, the opposite is true, as Miss. Code Ann. §11-46-17(4) specifically permits political subdivisions and/or governmental entities to purchase policies of insurance and become insured. L.W. v. McComb Separate Municipal School Dist., 754 So.2d 1136,1144 (Miss.1999).

Nor does Mississippi case law contain an instance in which the contractual right of indemnification of an insured was rendered null because the insured was a public entity. Likewise, there is no exclusion contained within the policy itself which would prohibit Franklin from asserting a right to indemnification.

As stated above, in the case of United States v. Myers, 363 F.2d 615 (5th Cir. 1966), the Fifth Circuit made it abundantly clear that the "organization legally responsible" policy language has been repeatedly interpreted as including employers in situations where the insured auto is being used in the course and scope of employment. Specifically, Myers was a case involving a Federal employee. It would appear that Farm Bureau was well aware of this precedent, in that its policy issued to Ms. Jordan contains a specific coverage exclusion for "the United States

Government or any of its Agencies, Departments, or Services", and Farm Bureau just as clearly has NOT included a similar exclusion related to State Governments, its instrumentalities, or local subdivisions. That exclusion states;

> The insurance with respect to any person or organization other than the named Insured or spouse does not apply:
> (4) to the United States Government or any of its Agencies, Departments, or Services.

Thus, it would appear that Farm Bureau understood the precedent in Myers and took steps to address that situation in its policy language. What Farm Bureau did NOT do was include an exclusion for State government entities or subdivisions, including Franklin County Memorial Hospital.

Therefore, with no exception for State employees in the policy, and no statutory language preventing Franklin's request for indemnification from Farm Bureau, the Trial Court's denial of Summary Judgment was in error and should be reversed.

IV. THE ORDER OF FINAL JUDGMENT OF THE CIRCUIT COURT WAS IN ERROR IN HOLDING THAT THE DISMISSAL OF MS. JORDAN FROM THIS LITIGATION SERVED TO ACT AS A RELEASE ON MS. JORDAN'S INSURANCE CARRIER, FARM BUREAU.

On or about October 31, 2003, Mr. Boyce Dover initiated a suit in the Circuit Court of Wilkinson County regarding the above-mentioned June 14, 2002 auto-related accident. As Defendants, Dover named only Ms. Jordan and her employer, Franklin. By early 2004, it was apparent to all parties involved that Ms. Jordan was in the course and scope of her employment at the time of the accident. As such, pursuant to the Tort Claims Act, the parties agreed that Ms. Jordan was not liable individually, and should be dismissed from the litigation, leaving only her employer, Franklin, as a defendant. An Order of Dismissal to that effect was entered by the Trial Court on or about July 9, 2004. (R. at 1). Subsequently, when Franklin filed its

Declaratory Judgment action in February of 2005 Farm Bureau never asserted the defense that it was not a proper party to the litigation because Farm Bureau's other "insured", Ms. Jordan, had been previously dismissed from the lawsuit. (R at 41-47).

On or about December 21, 2006, the Trial Court entered an Order of Final Judgment which stated, "The court finds persuasive the conclusion that the clear and unambiguous language of the agreed order of dismissal with prejudice as to Jordan individually, also operated to fully and completely release her individual auto insurance carrier, the Third-party Defendant, Mississippi Farm Bureau Mutual Insurance Company, from any responsibility or coverage." (R. at 206).

The decision of the Court was in error in that the specific language of the Order of Dismissal applied only to the dismissal of Ms. Jordan "in her individual capacity." Farm Bureau was not mentioned in the Order of Dismissal, nor was any party other than Ms. Jordan. At the time the Order was issued, Farm Bureau was not even a party to the litigation. Ms. Jordan was released "in her individual capacity" in July of 2004. Farm Bureau would not file an Answer in response to a Complaint for Declaratory Judgment until March of 2005. Yet, the Court appears to conclude that the Order of Dismissal contemplated Farm Bureau's involvement in the litigation and actually served as a *release* of Farm Bureau.

Yet, the Order of Dismissal does not mention Ms. Jordan's auto insurer, nor does the document contemplate a dismissal of any party other than Ms. Jordan. Specifically, Ms. Jordan was dismissed from the suit pursuant to Miss. Code Ann. §11-46-7(2) which grants immunity to individual employees for acts committed in the course and scope of employment. It should be noted that there is an important distinction between a party that is "dismissed" from litigation and one who is "released." The Court granted Ms. Jordan's request for dismissal because the

Tort Claims Act statutorily demanded it. As an employee of a governmental entity in the course and scope of her employment, she was immune from liability in this cause. In short, Ms. Jordan did not buy her peace and execute a release. The Order of Dismissal was in no way a "release" from liability for consideration or otherwise.

More importantly, it should be clear that Franklin, as the vicariously liable employer was an "insured" under the policy, as well as a named Defendant. The right to indemnification that belongs to Franklin as a result of being an "insured" was in no way dependent on Ms. Jordan remaining in the suit. Franklin's contractual right to indemnification came from Franklin's status as an "organization legally responsible" for the vehicle in question such that Franklin was required to pay a judgment in the amount of $49,500.00, and from common law rights of subrogation that arose from that payment.

The Trial Court appears to have confused the relationship between Ms. Jordan, Farm Bureau, and Franklin. Jordan and Franklin, were, in fact, employer and employee, and co-insured under the Farm Bureau policy. The Trial Court appears to link the *dismissal* of a negligent employee with the simultaneous *release* of the negligent employee's insurance carrier, but cites no authority for this proposition.

It is quite correct that the *release* of a negligent employee serves to also release the vicariously responsible *employer*. This was the holding in a recent case from the Mississippi Supreme Court. In that case the Court held, "Where a party's suit against an employer is based on respondeat superior, the vicarious liability claim itself is extinguished if the solely negligent employee has been released from liability for negligence." J & J Timber Co. v. Broome, 932 So.2d 1 (Miss. 2006), *overruling* W.J. Runyon & Son, Inc. v. Davis, 605 So.2d 38 (Miss. 1992). Of course, if the Trial Court is correct and Ms. Jordan was *released* from this litigation by the

Plaintiff, then the holding in J & J Timber would serve to also release her vicariously responsible employer, Franklin. Such a finding would ignore the fact that Ms. Jordan was immune from liability under the Tort Claims Act and that Ms. Jordan was not *released* from the litigation, but *dismissed.*

The Court in J & J Timber went on to hold "A majority of states have adopted the position that the release of a tortfeasor thereby releases the tortfeasor's principal for all claims of vicarious liability, despite any reservation of rights . . . We adopt the position advocated by these courts that the injured party's release of an employee extinguishes all claims of vicarious liability against the employer, despite any reservation of rights." J & J Timber Co. v. Broome, 932 So.2d 1,8 (Miss. 2006). Ironically, the Trial Court looked to the fact that the Order of Dismissal did not contain a reservation of rights against Farm Bureau, while it is clear that in a situation as found in J & J Timber, a reservation of rights would have no effect.

As stated above, it is quite correct that the *release* of a negligent employee serves to also release the vicariously responsible *employer.* But, in this case, the Trial Court did not extend release to Ms. Jordan's vicariously responsible *employer*, as in J & J Timber, but the Trial Court extended the release to include Ms. Jordan's *insurance carrier.*

It is important to note that in the case at hand, unlike in J & J Timber, the injured party did not *release* Ms. Jordan from the litigation. Ms. Jordan was *dismissed* on her own motion because she was immune as a government entity employee in the course and scope of her employment. Please recall that the Trial Court's Final Order of Final Judgment determined that **" . . . the agreed order of dismissal with prejudice as to Jordan individually, also operated to fully and completely release her individual auto insurance carrier . . . "** The Court appears to be equating the dismissal of Ms. Jordan with a voluntary release or even a settlement,

which somehow served to also release her insurance carrier. The Court cited to no case law for this proposition, and counsel for Franklin has uncovered no case law in Mississippi or elsewhere which would support such a proposition under a similar set of facts. It is as if the Court believes that the injured party, Boyce Dover, accepted payment from Ms. Jordan and her insurer, Farm Bureau, and therefore released them from the suit. However, that is just not the case. Farm Bureau and Franklin agreed to each pay half of the Judgment and reimburse the other carrier when the issue of coverage under the policy was determined.

In an attempt to understand the decision of the Trial Court, it should be noted that there are cases in Mississippi in which the *release* or settlement with the tortfeasor has extinguished the rights of an insurer. Mississippi does have a line of cases involving the *release* of a tortfeasor by an insured, and the effect of that release on the subrogation rights of the insurer. Many of those cases involve UM coverage, and the Court has stated in those instances that the insured's settlement with the uninsured motorist would have the effect of cutting off the insurer's right of statutory subrogation. Harthcock v. State Farm Mutual Automobile Insurance Co., et al., 248 So.2d 456 (Miss.1971).

Also, "The law has long been established in the state of Mississippi that when there is in the insurance contract a subrogation right and the insured releases the person whose negligence is the proximate cause of any damage to the insurable interest and thereby the insurer is prohibited from proceeding against the tort-feasor, the insured has no further rights to proceed against the insurer." Thompson v. Aetna Insurance Co., 245 So.2d 206 (Miss.1971). In that case it was held that the insured could not recover from the insurer, because the insured had executed a release of the tortfeasor in exchange for payment.

The Court has also stated that the right to seek subrogation is derivative, and as such, as the Mississippi Supreme Court has long recognized, "a subrogated insurer stands in the shoes of its insured, and takes no rights other than those that the insured had, and is subject to all defenses which the third party tort feasor might assert against the insured." Indiana Lumbermen's Mutual Insurance Co. v. Curtis Mathes Mfg. Co., 456 So.2d 750, 754 (Miss.1984).

However, after reviewing the above case law, please note that the common fact among them is that there was a settlement or a release, and that said settlement or release prevented a claim by an insured against an insurer or an insurer against a tortfeasor. In the case at hand, there has been no *release* or settlement, and the party seeking relief, Franklin, is not an insurer, but the vicariously responsible employer. Ms. Jordan was *dismissed* from the suit because she was immune from liability, leaving her employer, Franklin, as the sole Defendant. Further, Franklin is not an insurer whose rights could be extinguished by the dismissal of Ms. Jordan.

The Order of Final Judgment does not take into account that Franklin had rights of its own to protect and was a named Defendant in this litigation. Franklin was an "insured" under the policy, generating rights and duties independent from those of Ms. Jordan. There is no evidence that Franklin knowingly and voluntarily relinquished those rights against Farm Bureau, nor is there any evidence that Franklin knowingly and voluntarily relinquished its rights under the policy as an "insured."

Taken as a whole, it should be clear that the Order dismissing Ms. Jordan as a party, endorsed by the Court in July of 2004, did not *release* Farm Bureau from liability through intent of the signatories, through the specific language of the Dismissal Order, or by operation of law. As a result, the Trial Court's Order of Final Judgment was in error in that respect and should be reversed.

CONCLUSION

There is a clear consensus among authorities like *Couch on Insurance* on the meaning of the insurance contract term "organization legally responsible." Further, it could not be more clear that there is an abundance of solid of case-law on the subject from both the Federal Fifth Circuit, the Mississippi Court of Appeals, and elsewhere. These sources, taken in conjunction, are irrefutable evidence that an employer in these circumstances qualifies as an insured under the "organization legally responsible" insurance contract language. The failure of the Trial Court to consider this argument was clear error. Further, the holding of the Trial Court that the dismissal of Ms. Jordan served as a release of her insurance carrier is without a basis in law. As such, Franklin would respectfully request that the Order of the Circuit Court be over-ruled on the issue of indemnification, and that this Honorable Court issue an Order requiring Farm Bureau to defend and otherwise indemnify Franklin County Hospital in this cause.

Respectfully submitted, this the 21st day of May, 2007.

FRANKLIN COUNTY MEMORIAL HOSPITAL

By: ANDERSON CRAWLEY & BURKE, PLLC

By: Robert L. Grant

TIMOTHY D. CRAWLEY
ROBERT L. GRANT

ANDERSON CRAWLEY & BURKE, PLLC
TIMOTHY D. CRAWLEY/ MS. Bar No.7826
ROBERT L. GRANT/MS Bar No.10852
ATTORNEYS AND COUNSELORS
POST OFFICE BOX 2540
RIDGELAND, MS 39158-2540
TELEPHONE: (601) 977-8977
FACSIMILE: (601) 977-9975
E-MAIL: T.CRAWLEY@ACBLAW.COM
R.GRANT@ACBLAW.COM

LANE B. REED/MS. Bar No. 10002
McGEHEE McGEHEE & TOREY
POST OFFICE BOX 188
MEADVILLE, MS 39653
TELEPHONE: (601) 384-2343
E-MAIL: MMTLAW@MMTLAW.NET

CERTIFICATE OF SERVICE

I, Robert L. Grant, hereby certify that I have on this date mailed, by United States Mail, First Class, Postage Pre-paid, a true and correct copy of the above and foregoing Brief of Appellant to the following counsel of record:

Sam S. Thomas, Esq.
Underwood Thomas, P.C.
Post Office Box 24057
Jackson, Mississippi 39225

So certified, this 21st day of May, 2007.

Robert L. Grant

TIMOTHY D. CRAWLEY
ROBERT L. GRANT

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

FRANKLIN COUNTY MEMORIAL HOSPITAL — APPELLANT

V. — CAUSE NO. 2007 - TS - 00142

MISSISSIPPI FARM BUREAU MUTUAL INSURANCE COMPANY — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF FRANKLIN COUNTY, MISSISSIPPI
CIVIL ACTION NO. 04-CV013

BRIEF OF APPELLANT

FRANKLIN COUNTY MEMORIAL HOSPITAL

ORAL ARGUMENT REQUESTED

TIMOTHY D. CRAWLEY/ MS. Bar No. [redacted]
ROBERT L. GRANT/MS Bar No. [redacted]
ANDERSON CRAWLEY & BURKE, PLLC
ATTORNEYS AND COUNSELORS
POST OFFICE BOX 2540
RIDGELAND, MS 39158-2540
TELEPHONE: (601) 977-8977
FACSIMILE:(601) 977-9975
E-MAIL: T.CRAWLEY@ACBLAW.COM
R.GRANT@ACBLAW.COM

LANE B. REED/MS. Bar No [redacted]
McGEHEE McGEHEE & TOREY
POST OFFICE BOX 188
MEADVILLE, MS 39653
TELEPHONE: (601) 384-2343
E-MAIL: MMTLAW@MMTLAW.NET

CERTIFICATE OF SERVICE

I, Robert L. Grant, hereby certify that I have on this date mailed, by United States Mail, First Class, Postage Pre-paid, a true and correct copy of the above and foregoing Brief of Appellant to the following counsel of record:

Sam S. Thomas, Esq.
Underwood Thomas, P.C.
Post Office Box 24057
Jackson, Mississippi 39225

Honorable Forrest A. Johnson
Franklin County Circuit Court Judge
Post Office Box 1372
Natchez, MS 39121

So certified, this 21st day of May, 2007.

Robert L. Grant

TIMOTHY D. CRAWLEY
ROBERT L. GRANT