IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2007-CA-00193

USF&G INSURANCE COMPANY OF MISSISSIPPI	APPELLANT / CROSS-APPELLEE
VS.	
DEBBIE MARTIN D/B/A CARTMELL GALLERY	APPELLEE / CROSS-APPELLANT

APPEAL FROM THE CIRCUIT COURT OF
LAUDERDALE COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLEE / CROSS-APPELLANT DEBBIE MARTIN D/B/A CARTMELL GALLERY

ORAL ARGUMENT REQUESTED

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REQUEST FOR ORAL ARGUMENT

Comes now, the Appellee/Cross-Appellant, Debbie Martin d/b/a Cartmell Gallery, and requests oral argument. Oral argument would be beneficial to the Court's understanding of the facts as they apply to the law on the issues raised in this appeal.

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STATEMENT OF THE CASE ON CROSS-APPEAL

On September 29, 2006, Debbie Martin, d/b/a Cartmell Gallery ("Ms. Martin") was awarded a jury verdict on three counts of her complaint against The St. Paul Business Foundation Series, USF&G Insurance Company of Mississippi ("USF&G") regarding the coverage under her insurance policy with USF&G. R.6/818. The jury awarded Ms. Martin $39,329.00 on Count I regarding her coverage under the Sewer and Drain Backup Provision, $2,215.00 on Count II regarding her coverage under the fine arts provision of her insurance contract, and $3,084.00 on Count III regarding her coverage on the electronic data processing system provision of her insurance contract. *Id.*

The subject of this appeal is the case that stemmed from the incident on or about April 7, 2003, when sewage or drainage backed up or overflowed and entered Ms. Martin's Gallery, and USF&G refused to pay the insurance claim submitted to it by Ms. Martin. R.E. 2; R.4/383-387.

Ms. Martin's insurance contract with USF&G provided coverage for two separate premises at the same physical address: (1) her picture frames and custom framing business, and (2) her art gallery/dealer business, with a maximum amount of coverage for on each premise of $26,523.00, resulting in total coverage of $53,046.00. R.E. 11A, 11B, 13; R. Exhibit #P-1, P-2, P-4. The coverage for each premise (#1 and #2), also contained a $25,000.00 cap for additional sewer or drain backup coverage, resulting in a total cap of $50,000.00 on this coverage. *Id.*

On October 3, 2006, USF&G filed a Motion for Remittitur on the basis that the jury verdict in favor of Ms. Martin on Count I regarding coverage under the Sewer and Drain Backup provision of the insurance contract was in excess of the $25,000.00 cap on the amount that could be recovered under that provision of her insurance contract on only one of her premises. R.6/820-929. On December 20, 2006, the Circuit Court, Honorable Robert Bailey presiding, sustained USF&G's Motion for Remittitur, and the verdict on Count I was remitted to

$25,000.00, based on the maximum amount recoverable for such an event involving only one of the premises. R.E. 8; R.7/981-982.

On September 14, 2005, USF&G filed a Motion for Summary Judgment. R.2,3/290-354. The Circuit Court granted USF&G's Motion for Summary Judgment on March 23, 2006, denying Ms. Martin's claim for bad faith denial of coverage. R.E. 6; R.5/630-643. On Cross-Appeal, Ms. Martin contends that the Circuit Court erred in granting USF&G's Motion for Summary Judgment as to Ms. Martin's claim for bad faith denial of coverage, only as it applies to Count III regarding the electronic data processing system coverage. *See* R.E. 9; R.7/988-989; Brief of Appellee/Cross-Appellant Debbie Martin d/b/a Cartmell Gallery.

Prior to the trial, USF&G refused to pay the claim that was the subject of Count III, which dealt with the electronic data processing system coverage. R.E. 2; R.4/383-387. USF&G claims in its brief that Ms. Martin never provided the documentation for this claim, but as USF&G was aware, the documentation it requested was destroyed by the sewage or drainage that entered Ms. Martin's Gallery; so instead of the destroyed documentation, Ms. Martin provided an itemized statement of the losses to USF&G. Brief of Appellant USF&G [*hereinafter* Appellant Brief], p. 3-4, n. 1; R.E. 18; R. Exhibit #P-13.

After the jury returned its verdict of $3,084.00 on Count III, USF&G withheld the payment of this portion of the judgment without providing any reason or justification, even though it did not appeal that particular Count of the jury's verdict when it filed its appealed on January 19, 2007; and it continued to withhold this payment until January 9, 2008. Appellant Brief, p. 3-4, n. 1; Reply Brief of Appellant/Response of Cross-Appellee USF&G [*hereinafter* Reply Brief], p. 23. In its Reply Brief, USF&G contends that the matter is resolved since it paid the amount of this judgment over fifteen months after the judgment was entered, but provided no reason for the delay. Reply Brief, p. 23.

SUMMARY OF ARGUMENT ON CROSS-APPEAL

The Circuit Court erred in sustaining USF&G's Motion for Remittitur and reducing the jury's verdict on Count I of the Complaint to $25,000.00. The reason for sustaining this motion was a misunderstanding of the $25,000.00 cap in the sewer and drainage backup provision of the insurance policy applicable to each of the premises covered under the policy. In sustaining this motion, the Circuit Court abused its discretion in this matter because it did not find that the verdict was "shocking to the conscience," nor did it find that the verdict was "contrary to the overwhelming weight of the credible evidence." Therefore, this Court should reverse the Circuit Court on this issue and reinstate the jury verdict of $39,329.00 on Count I of Ms. Martin's Complaint.

The Circuit Court also erred by granting USF&G's Motion for Summary Judgment with regard to Ms. Martin's claim for bad faith denial, as it pertains to the claim in Count III, regarding the electronic data processing system coverage. USF&G refused to pay the claim which was the subject of Count III of Ms. Martin's Complaint, citing its request for documentation that it knew to be destroyed when sewage or drainage backed up or overflowed and entered Ms. Martin's Gallery. Further, after the jury returned its verdict in favor of Ms. Martin on Count III, USF&G continued to withhold this payment for over fifteen months without citing any reason whatsoever. Thus, this Court should reverse the Circuit Court's decision granting USF&G's Motion for Summary Judgment on this issue and remand this issue to the Circuit Court for a jury trial on Ms. Martin's claim for bad faith withholding of this particular payment by USF&G and punitive damages therefor.

ARGUMENT ON CROSS-APPEAL

I. The Circuit Court erred by granting USF&G's Motion for Remittitur.

USF&G has correctly cited *Stringer v. Crowson* in its Reply Brief for the standard of review for considering a remittitur on appeal. Reply Brief, p. 15. This Court, in *Stringer*, stated:

> The standard of review for considering a remittitur on appeal is limited to determining whether the trial court abused its discretion. *Ross-King-Walker, Inc. v. Henson*, 672 So.2d 1188, 1193 (Miss. 1996)[, rehearing denied]. Our [S]upreme [C]ourt has also held that jury awards are not merely advisory and will not under the general rule be set aside unless so unreasonable as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous. *Wallace v. Thornton*, 672 So.2d 724, 729 (Miss. 1996). Put another way, **the trial judge may only usurp the jury's function in setting a damage award, when he finds . . . either: (1) that the jury's verdict is so shocking to the conscience that it evinces bias, passion, and prejudice on the part of the jury; or (2) that the verdict was contrary to the overwhelming weight of the credible evidence.** *State Highway Comm'n of Mississippi v. W.W. Warren*, 530 So.2d 704, 707 (Miss. 1988). **'Absent either of these findings, the trial court abuses its discretion.'** *Id.*

Stringer v. Crowson, 797 So.2d 368, 370-71 ¶ 5 (Miss. Ct. App. 2001), rehearing denied, certiorari denied.

It is clear that in this case the trial judge abused his discretion in granting USF&G's Motion for Remittitur, since the jury's verdict was not "shocking to the conscience" at all, nor was it "contrary to the overwhelming weight of the credible evidence." This Court has stated that, **"Judges cannot sit as jurors, and the question before them is never what they would have done sitting as a juror but whether, considering the evidence in the light most favorable to the non-moving party, together with all reasonable inferences which may be drawn therefrom, the court should disturb the jury verdict."** *Holmes County Bank and Trust Co. v. Staple Cotton Cooperative Assoc.*, 495 So.2d 447, 451 (Miss. 1986) (*citing City of Jackson v. Locklar*, 431 So.2d 475 (Miss. 1983)).

The jury awarded Ms. Martin a verdict in the amount of her actual damages of $39,329 under the claim that was the subject of Count I, which dealt with her coverage for sewer and

drain backup under her insurance contract. R.6/818. This amount was far from "shocking." It was not even excessive, since it was within the amount of the cap on the additional coverage for sewer or drain backup in the policy. R.E. 10, 11A, 11B; R. Exhibit #P-1, P-2.

The weight of the credible evidence presented by Ms. Martin at trial was consistent with the jury's verdict. USF&G's own representative, Robert Hewitt, was called by Ms. Martin as a witness during the trial, and he specifically examined and identified Ms. Martin's claim coverage detail. R.E. 13; R.8/129-131, Exhibit #P-4. Mr. Hewitt circled the $26,523.00 building limit insurance on page two of Exhibit P-4 twice, and testified that the insurance policy covered Premise (1) 609 22nd Avenue for $26,523.00, and Premise (2) 609 22nd Avenue for $26,523.00, resulting in total coverage of $53,046.00. *Id.* Exhibit P-4 also indicated that the policy contained provisions covering Premise (1) with sewer and/or drain backup coverage of up to $25,000.00, and Premise (2) with sewer or drain backup coverage of up to $25,000.00, resulting in total sewer or drain backup coverage of $50,000.00. R.E. 13 R. Exhibit #P-4. **USF&G's own representative acknowledged that the separate premises were covered with separate coverage amounts under the policy, which shows that its denial of this fact in its Reply Brief must have been either a misunderstanding of its own policy or a misrepresentation on its part.** *Id. See also* Reply Brief, p. 15-17.

These two premises are two separate businesses of Ms. Martin, Premise (1) for picture frames and custom framing, and Premise (2) for an art gallery/dealer. R.E. 10, 11A, 11B, 13; R. Exhibit #P-1, P-2, P-4. Despite USF&G's misunderstanding or misrepresentation of its own policy in its Reply Brief, it sold one insurance policy with separate limits on the amount of coverage; this policy required the payment of only one premium, but covered two premises at the same physical address. Reply Brief, p. 17. *See also* R.E. 13; R.8/129-131. USF&G also attempts to persuade this Court that there should only be one limit by citing to an exchange at the

Hearing of USF&G's Motion for Remittitur, where Ms. Martin's attorney admitted that there was only one policy. Reply Brief, p. 16. *See also* T.R. 272-273. The fact that there was a single policy is not what this issue is about; it is about the separate amounts of coverage for the two premises covered under the single policy.

Pursuant to Exhibits P-1 and P-4 and the testimony of Mr. Hewitt, USF&G lists the property coverage amount twice, and therefore the sewer or drain backup coverage amount twice, providing a total of up to $50,000.00 of coverage for sewer or drain backup. R.E. 10, 11A, 11B, 13; R. Exhibit #P-1, P-2, P-4. Further, USF&G waived any claim of limits pursuant to a Pre-trial Order. R.E. 7; R.6/770-773.

Ms. Martin paid for one policy which provided coverage for two premises with the amount of coverage being $26,523.00 on each, resulting in total coverage of $53,046.00. R.E. 10, 11A, 11B, 13; R. Exhibit #P-1, P-2, P-4. The policy also included a $25,000.00 cap on coverage for sewer or drain backup on each of the premises, resulting in a maximum of $50,000.00 of sewer or drain backup coverage. *Id.* Therefore, Ms. Martin should be entitled to the entire $39,329.00 judgment on Count I.

The trial judge clearly abused his discretion in sustaining USF&G's Motion for Remittitur since it is clear that the jury's verdict was not "shocking to the conscience" at all, nor was it "contrary to the overwhelming weight of the credible evidence," when view in a light most favorable to Ms. Martin. Therefore, the decision to sustain USF&G's Motion for Remittitur should be reversed, and the entire amount of the jury verdict reinstated.

II. The Circuit Court erred by granting USF&G's Motion for Summary Judgment with regard to Ms. Martin's claim for bad faith denial of her claim under the electronic data processing system provision of her insurance contract.

In its Reply Brief, USF&G quixotically argues the merits of Ms. Martin's claim for punitive damages for bad faith denial of her claim under the electronic data processing system provision of her insurance contract and superfluously argues that the jury's verdict was incorrect on Count III, even though that portion of the decision is not a subject of the appeal by USF&G. *See* Reply Brief, p. 17-23. This argument by USF&G fails to address the issue at hand, whether it was entitled to summary judgment on this issue, and is immaterial to the matter at issue, with the possible exception of demonstrating that a disagreement between the parties exists.

The standard of review for a trial court's granting of a Motion for Summary Judgment has been stated by this Court in *Mississippi Dep't of Wildlife, Fisheries & Parks v. Mississippi Wildlife Enforcement Officers' Ass'n, Inc.*, where it was stated that:

> This Court's standard of review of a trial court's grant of summary judgment is well established:
>
> Our appellate standard for reviewing the grant or denial of summary judgment is the same standard as that of the trial court under Rule 56(c) of the Mississippi Rules of Civil Procedure. **This Court employs a *de novo* standard of review of a lower court's grant or denial of summary judgment** and examines all the evidentiary matters before it-admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. **The evidence must be viewed in the light most favorable to the party against whom the motion has been made. If, in this view, there is no genuine issue of material fact and, the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor. Otherwise, the motion should be denied. Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite. In addition, the burden of demonstrating that no genuine issue of fact exists is on the moving party. That is, the non-movant should be given the benefit of the doubt.** *McCullough v. Cook*, 679 So.2d 627, 630 (Miss. 1996) (quoting *Mantachie Natural Gas Dist. v. Mississippi Valley Gas Co.*, 594 So.2d 1170, 1172 (Miss.

1992); *Clark v. Moore Mem'l United Methodist Church*, 538 So.2d 760, 762 (Miss. 1989)).

Mississippi Dep't of Wildlife, Fisheries & Parks v. Mississippi Wildlife Enforcement Officers' Ass'n, Inc., 740 So.2d 925, 929-30 ¶ 11 (Miss. 1999).

In order to uphold the trial court's grant of USF&G's Motion for Summary Judgment with regard to Ms. Martin's claim for bad faith denial of her claim under the electronic data processing system provision of her insurance contract, this Court will apply a *de novo* standard of review. *Id.* This Court would have to find that when viewing the evidence in the light most favorable to Ms. Martin, that USF&G met its burden of proving that "no genuine issue of fact exists" with regard to this issue. *Id.* For "no genuine issue of fact" to exist, it would have to be undisputed that USF&G had an arguable basis for denying Ms. Martin's claim and acted in good faith when denying this claim and withholding the payment of this judgment for over fifteen months. *Id.* However, these contentions are clearly in dispute.

Prior to the trial in this case, Ms. Martin's claim for her damages under the electronic data processing system provision, which was the subject of Count III, was not paid, even though Ms. Martin filed her claim, provided itemization of costs, and that provision was not subject to the water exclusion on which the majority of USF&G's appeal is based. *See* Appellant Brief; Reply Brief. In USF&G's Reply Brief, it contends that it requested substantiating documentation to pay the claim, but as it was well aware, such documentation was destroyed by the sewer or drainage backup that entered Ms. Martin's Gallery. Reply Brief, p. 20-21. The Reply Brief states that, "[t]he 'ball' was in Martin's 'court' to provide the requested supportive documents . . ." *Id.* at p. 20. However, as USF&G is well aware from Ms. Martin's claim, the "ball" was destroyed when Ms. Martin's "court" was damaged due to the sewer or drainage backup. Ms. Martin provided the best documentation that she could in the form of her itemized loss statement, and her claim nevertheless denied by USF&G. R.E. 18; R. Exhibit #P-13.

Further, as admitted by USF&G in its Appellant Brief, it had not paid Ms. Martin the judgment amount of $3,884.00 with eight (8%) percent interest from the date of the judgment on Count III related to her coverage claim for electronic data processing systems. Appellant Brief p. 3,4, n. 1. In fact, this amount was not sent by USF&G until January 9, 2008. USF&G offers no reason whatsoever for the delay of the payment from the date the judgment on this claim was entered, October 3, 2006, and the date the payment was sent, January 9, 2008. This electronic data processing system coverage was additional coverage offered through the policy and was not subject to water exclusion on which the majority of USF&G's appeal is based. R.E. 10, 11A, 11B; R. Exhibit #P-1, P-2. Further, the jury's verdict on Count III was not appealed by USF&G. USF&G simply stated that, "this issue has been resolved[,]" and did not provide any reason, legitimate or otherwise, for the over fifteen month long delay in the payment of this portion of the judgment. Reply Brief, p. 23.

This Court has stated that, "[a]rguably-based denials are generally defined as those which were rendered upon dealing with the disputed claim fairly and in good faith." *Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d 1172, 1184 (Miss. 1990). This Court has further stated that, with regard to the issue of bad faith denial of an insurance claim that, "the issue of punitive damages may be submitted, notwithstanding the presence of an arguable basis, where there is a question that the mishandling of a claim or the breach of an implied covenant of good faith and fair dealing may have reached the level of an independent tort." *Stewart v. Gulf Guaranty Life Ins. Co.*, 846 So.2d 192, 200-201 ¶ 32-34 (Miss. 2002), rehearing denied (*citing Lewis v. Equity Nat'l Life Ins. Co.*, 637 So.2d 183, 185 (Miss. 1994) (citing *Williams*, 566 So.2d at 1186)).

In this case, there are clearly facts sufficient to require a denial of this portion of USF&G's Motion for Summary Judgment as the facts in this case demonstrate that parties clearly disagree on whether USF&G had an arguable basis for, and acted in good faith when,

denying this claim and refusing to pay the judgment on this claim for over fifteen months. Thus, when these facts are viewed in a light most favorable to Ms. Martin, it is clear that genuine issues of fact exist.

Therefore, when this Court reviews the trial court's grant of USF&G's Motion for Summary Judgment under a *de novo* standard, it should reverse the trial court's decision to grant USF&G's Motion for Summary Judgment, and remand this case to trial court for a jury trial on Ms. Martin's claim for bad faith withholding of this particular payment by USF&G and punitive damages therefor.

CONCLUSION

Based on the foregoing, the trial judge abused his discretion in sustaining USF&G's Motion for Remittitur, and thus, its decision to sustain USF&G's Motion for Remittitur should be reversed and the entire amount of the jury verdict reinstated.

Also, the trial court erred in granting the Motion for Summary Judgment as it pertains to Ms. Martin's bad faith denial of coverage claim for the denial of coverage under the electronic data processing coverage provision of her insurance contract, since genuine issues of material fact exist and the parties disagree on the matter. Thus, USF&G was not entitled to judgment as a matter of law. Therefore, this Court should reverse the trial court's grant of USF&G's Motion for Summary Judgment on this issue and remand this case to the trial court for a jury trial on USF&G's bad faith denial of Ms. Martin's claim under the electronic data processing system coverage provision of her insurance contract and punitive damages therefor.

RESPECTFULLY SUBMITTED, this the 15th day of February, 2008.

DEBBIE MARTIN D/B/A CARTMELL GALLERY

BY: Charles W. Wright

CHARLES W. WRIGHT, JR., ATTORNEY FOR DEBBIE MARTIN D/B/A CARTMELL GALLERY, APPELLEE/CROSS-APPELLANT

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CERTIFICATE OF FILING

I, Charles W. Wright, Jr., do hereby certify that I have this day caused to be delivered, the original and three true and correct paper copies of the Brief in Reply to the Response of the Appellant/Cross-Appellee to the Issues Presented by the Cross-Appeal of Appellee/Cross-Appellant Debbie Martin d/b/a Cartmell Gallery, to:

Betty Sephton, Clerk
Supreme Court of the State of Mississippi
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This the 15th day of February, 2008.

Charles W. Wright

CHARLES W. WRIGHT, JR.,
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CERTIFICATE OF SERVICE

I, Charles W. Wright, Jr., do hereby certify that I have this date mailed, postage prepaid, by United States mail a true and correct paper copies of the foregoing Brief in Reply to the Response of the Appellant/Cross-Appellee to the Issues Presented by the Cross-Appeal of Appellee/Cross-Appellant Debbie Martin d/b/a Cartmell Gallery to the following:

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