

**IN THE SUPREME COURT OF MISSISSIPPI**

**ST. PAUL TRAVELERS' INSURANCE COMPANY**

**APPELLANT**

**V.**

**CAUSE NO. 2007-CA-00914**

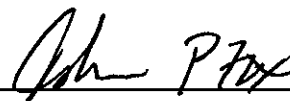
**SAM D. BURT AND  
KIM M. BURT**

**APPELLEES**

**CERTIFICATE OF INTERESTED PERSONS**

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 the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Travelers' Insurance Company, heretofore known as St. Paul Travelers' Insurance Company, the Appellant herein
2. Markow Walker, P.A., Attorneys
3. Reed Martz, of counsel for Appellant
4. Sam D. Burt, Appellee
5. Kim M. Burt, Appellee
6. John P. Fox, of counsel for Appellees

  
\_\_\_\_\_  
JOHN P. FOX, MSB NO. [REDACTED]  
ATTORNEY FOR SAM D. BURT & KIM M. BURT  
FOX LAW FIRM  
POST OFFICE BOX 167  
HOUSTON, MISSISSIPPI 38851  
(662) 456-4201

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**STATEMENT FOR ORAL ARGUMENT**

The Appellees request oral argument.

**STATEMENT OF ISSUE RAISED BY APPELLEES' MOTION TO DISMISS**

The Appellant did not file supersedeas bond nor obtain a stay order concerning the tendered \$25,000.

The funds have been disbursed and the case should be dismissed. Even the Appellant has accepted the amount tendered pursuant to court order, having presented the draft for payment and deposited the proceeds in an account for and on behalf of the Appellant.

### **STATEMENT OF THE CASE**

Samuel D. Burt, on November 15, 2001, was an employee of Bruce Furniture Industries when he was injured in an automobile accident which arose out of his employment.

Sam Burt was a guest passenger in a vehicle driven by a co-employee, James Easley. The vehicle in which Sam was riding was struck from the rear by another vehicle being operated by Roger Clements. Roger Clements was an insured of Mississippi Farm Bureau with maximum limits of \$25,000.

James Easley had a policy of liability insurance with \$2,000 medical pay benefits. The Easley policy of insurance excluded med pay benefits in the event of injury involving a workmen's compensation claim.

The workmen's compensation carrier for Bruce Furniture paid \$7,340.26 in temporary total and, perhaps, permanent partial benefits directly to Sam Burt. An additional \$20,388.95 was paid for medical services to medical providers selected by the workmen's compensation carrier.

Subsequent to filing suit for and on behalf of the Burts, the \$25,000 limits of liability were tendered by the insurance carrier for Roger Clements. Relative to the tender of the \$25,000 via a Petition to Interplead Funds, the parties presented arguments as to how the funds should be disbursed.

In support of Appellees' Motion to Dismiss the appeal of Appellant, the statement of Mrs. Deborah Dunn, Circuit Clerk of Calhoun County, Mississippi, is attached hereto and marked "Exhibit 1," and asked to be considered a part hereof as if fully copied herein.

It is pointed out in Mrs. Dunn's Statement that on December 5, 2006, Judge Henry L.

Lackey entered an Order for the disbursement of the \$25,000, with one-third being applied to attorney's fees, one-third to Sam Burt and wife, and the balance to St. Paul Travelers Insurance Company, being also one-third. A copy of Judge Lackey's Order of December 5, 2006, is attached as "Exhibit A" to Mrs. Dunn's Statement.

On the same day that Judge Lackey signed this Order, he entered another Order setting aside his prior Order of disbursement, pointing out that this matter had been assigned to Judge Andrew K. Howorth. A copy of the Order setting Judge Lackey's Order of disbursement is attached as "Exhibit B" to the Statement of Mrs. Dunn.

Thereafter, on May 3, 2007, Judge Andrew K. Howorth entered his Order directing that the \$25,000 would be disbursed with one-third applied to attorney's fees, one-third paid to Sam Burt and wife, and one-third to be paid to St. Paul Travelers Insurance Company. Judge Howorth's Order of May 3, 2007, was filed on May 5, 2007, as evidence by a copy attached as "Exhibit C" (R-17) to the Statement of Deborah Dunn, Circuit Clerk.

In accord with the Court's Order of disbursement, the Circuit Clerk disbursed the funds. The check issued to St. Paul Travelers Insurance Company, being check number 1359, cleared the account of the Circuit Clerk on June 1, 2007.

It is significant to note the St. Paul Travelers Insurance Company did not obtain an order prohibiting disbursement of the funds, nor did file a supersedeas bond in this cause.

## **ARGUMENT OF APPELLEES FOR DISMISSAL OF APPEAL**

According to Black's Law Dictionary, 6<sup>th</sup> Edition, supersedeas is defined as follows:

"In Practice. The name of a writ containing a command to stay the proceedings at law.

A suspension of the power of a trial court to issue an execution on judgment appealed from, or, if writ of execution has issued, it is a prohibition emanating from court of appeal against execution of writ. *Stewart v. Hurt*, 9 Cal.2d 39, 68 P.2d 726, 727.

An auxiliary process designed to supersede enforcement of trial court's judgment brought up for review, and its application is limited to the judgment from which an appeal is taken. *Mascot Pictures Corporation v. Municipal Court of City of Los Angeles*, 3 Cal.App.2d 559, 40 P.2d 272.

Originally it was a writ directed to an officer, commanding him to desist from enforcing the execution of another writ which he was about to execute, or which might come in his hands. In modern times the term is often used synonymously with a "stay of proceedings," and is employed to designate the effect of an act or proceeding which of itself suspends the enforcement of a judgment. *Dulin v. Coal Co.*, 98 Cal. 306, 33 P. 123."

§11-51-43, of the Mississippi Code as Annotated, states as follows:

"In any case of an appeal to the supreme court, where no special provision is made by law for a supersedeas of the judgment or decree appealed from, or for the bond to be given in such case, a supersedeas may be allowed by the court rendering the judgment or decree appealed from or by the judge thereof, or by the supreme court or any of the judges of said court, upon such bond, with such sureties as said court or judge may direct in the order of a supersedeas."

Of course, the above section was modified or supplemented by M.R.A.P., Rule 8, of the Mississippi Rules of Appellate Procedure, providing as follows:

"Stay or Injunction Pending Appeal.



(a) Stay by Clerk's Approval of Supersedeas Bond. The appellant shall be entitled to stay of execution of a money judgment pending appeal if the appellant gives a supersedeas bond, payable to the opposite party, with two or more sufficient resident sureties, or one or more guaranty or surety companies authorized to do business in this state, in a penalty of 125 percent of the amount of the judgment appealed from conditioned that the appellant will satisfy the judgment complained of, and also such final judgment as may be made in the case. The clerk of the trial court shall approve such bond and the approval of supersedeas bond by the clerk shall constitute a stay of the judgment. In the event the clerk declines to approve the bond, or the clerk's approval is contested, or the appellant seeks a stay on any basis other than compliance with this subdivision, the requirements of Rule 8(b) apply.

(b) Other Stays Must Ordinarily Be Sought in the First Instance From the Trial Court.

(1) Application for a stay of the judgment or the order of a trial court pending appeal or for approval or disapproval of a contested supersedeas bond or for an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance to the trial court. The court shall require the giving of security by the appellant in such form and in such sum as the court deems proper, and for good cause shown may set a supersedeas bond in an amount less than the 125 percent required in cases under Rule 8(a).

(2) However, a bond or equivalent security required on any money judgment entered in whole or in part on account of punitive damages shall, as to the punitive damages portion of the judgment only, be the lower of:

(A) 125 percent of the total amount of punitive damages, or

(B) ten percent of the net worth of the defendant seeking appeal as determined by applying generally accepted accounting principles to the defendant's financial status as of December 31, of the year prior to the entry of the judgment for

punitive damages.

(C) Absent unusual circumstances, the total amount of the required bond or equivalent security for any case as to punitive damages shall not exceed \$100,000,000.

(3) To qualify for reduction of bond or equivalent security under subpart (b)(2)(b), there must be a good and sufficient showing that the imposition of a supersedeas bond of 125% of the full judgment appealed from would place that appellant in a condition of insolvency or would otherwise substantially threaten its future financial viability.

(4) When the appellant is allowed the benefit of a reduction in bond or equivalent security under subpart (b)(2)(b) or (c), the court may require submission of such reports or evidence to the court and to opposing parties as will allow them to be properly informed of the financial condition of the appellant during the period of supersedeas. If at any time after notice and hearing, the court finds that an appellant who has posted a bond or equivalent security for less than 125 percent of the full amount of the judgment has taken actions that affect the financial ability of the appellant to respond to the judgment, or has taken other actions with the intent to avoid the judgment, the court shall increase the bond or equivalent security to the full 125 percent of the judgement. If the appellant does not post the additional bond required by the court, the stay shall be revoked.

(5) If a hearing is necessary for the issues arising under subpart (b), the judgment shall be stayed during such hearing and for ten days following the trial court's ruling. The ruling of the trial court on motions filed under this subpart (b) shall be reviewable by the Supreme Court or the Court of Appeals.

(c) Motion to Stay or Vacate Stay in Supreme Court. A motion for such relief may be made to the Supreme Court (or to the Court of Appeals in cases assigned by the Supreme Court to the Court of Appeals), but the motion shall show that the application to the trial court for relief sought is not practicable, or that the trial court has denied an application or has failed to afford the relief which the applicant has requested, with the reasons given by the trial court for its action. The motion shall

also show the reasons for the relief requested and the facts relied upon and if the facts are subject to dispute, the motion shall be supported by affidavits or other sworn statements. The applicant shall file an original and four (4) copies of the motion for stay and, if the motion is opposed, shall attach legible copies of the documents listed below. If the applicant asserts that time does not permit the filing of a written motion, applicant shall deliver to the clerk five (5) legible copies of each of the listed documents as soon as possible. If any listed document cannot be attached or delivered, a statement of the reason for the omission shall be substituted. The documents required are:

- (1) The application to the trial court for a stay;
- (2) Each brief or memorandum of authorities filed by a party to the application in the trial court;
- (3) The opinion giving the reasons advanced by the trial court for denying relief;
- (4) The trial court order of judgment denying relief.

Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk of the Supreme Court and will be considered by a panel of the Supreme Court or the Court of Appeals. In emergency cases, the application may be considered by a single justice or judge of the appropriate appellate court, and the applicant shall file the motion with the Clerk of the Supreme Court in writing as promptly as possible.

(d) Stay May Be Conditioned Upon the Giving of a Bond; Proceedings Against Sureties. Relief available in the Supreme Court or the Court of Appeals under this rule may be conditioned upon the filing of a bond or other appropriate security in the trial court. If the security is given in the form of a bond or stipulation or undertaking with one or more sureties, each surety submits itself to the jurisdiction of the trial court and irrevocably appoints the clerk of the trial court as its agent upon whom any papers affecting its liability on the bond or undertaking may be served. The surety's liability may be enforced on motion in the trial court without the necessity of an independent action. The motion and notice of the motion may be served upon the clerk of the trial court, who shall forthwith

mail copies to the sureties if their addresses are known.”

As indicated by the comments, following the Rule, Rule 8(a) is based on Miss. Code Ann. §11-51-31 (Supp. 1994) and provides for a stay of a money judgement pending appeal upon approval of a supersedeas bond by the clerk of the trial court. In a case involving only a money judgment, the appellant may obtain a stay by posting a bond approved by the clerk.

In this case, the insurance company, i.e., St. Paul Travelers, failed to tender a bond to be approved by the lower court clerk nor was there an application made to the Supreme Court as provided by the Rules and the old statute.

In fact, the Appellant participated in a division of the funds, as ordered by the lower court, and placed the check in its bank account which has cleared the Circuit Court’s account, having done so on June 1, 2007.

In the case of the Estate of Moreland, 537 So.2d 1345 (Miss. 1989) at page 10347, this Honorable Court made the following observation, in its opinion:

“Where there is appeal is without supersedeas, the successful party may proceed to execute on the lower court decree...”

Since the St. Paul Travelers Insurance Company failed to obtain supersedeas bond, the Burts were entitled to execute on the lower court’s order or have the funds disbursed by the clerk.

In the case of Lindsey v. Lindsey, 219 Miss. 720, 69 So.2d 844, (1954), at page 723, states as follows:

“The successful party may, if the appeal is without supersedeas, proceed to execute on the decree; but, if it is with supersedeas, execution thereon is suspended.”

Defined in the case of McNeil v. Hunter, 753 So.2d 1057 (Miss. 2000), we find a

reiteration of a number of cases as follows:

“If the appeal is without supersedeas, as is the appeal at hand, the appellee may proceed to execute on the decree in the lower court.”

Not only did the St. Paul Travelers Insurance Company fail to attempt to make a supersedeas bond or tender a bond to the clerk of the lower court, the insurance carrier actually seemingly joined in the request for disbursement of funds and accepted the one-third allocated to them by the lower court.

In view of the facts and circumstances, the insurance carrier is estopped from proceeding further with this cause on appeal, and the case should be dismissed at the cost of the Appellant.

## CONCLUSION

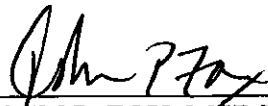
Attorney's fees in the amount of at least one-half of the lower court's award to the undersigned attorney should be made, together with costs and any other appropriate monetary award to appellees and their counsel.

This matter became res adjudicata when the appellant failed to obtain supersedeas and disbursement was had of the funds and acceptance of each of the appellees, appellant and counsel for the appellees.

Respectfully submitted,

SAM D. BURT and KIM M. BURT,  
Appellees

BY:

  
\_\_\_\_\_  
JOHN P. FOX, MSB NO [REDACTED]  
Of Counsel for Appellees

FOX LAW FIRM  
330 EAST MADISON STREET  
POST OFFICE BOX 167  
HOUSTON, MS 38851  
(662) 456-4201

### CERTIFICATE OF SERVICE

I, John P. Fox, of counsel for appellees, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing Brief of Appellees to:

Honorable Andrew Howorth  
Circuit Court Judge  
1 Courthouse Sq., Ste. 101  
Oxford, MS 38655

M. Reed Martz, Esq.  
Markow Walker  
P.O. Drawer 50  
Oxford, MS 38655

This the 29th day of October, 2007.

  
\_\_\_\_\_  
JOHN P. FOX

IN THE MISSISSIPPI SUPREME COURT

ST. PAUL TRAVELERS' INSURANCE COMPANY

APPELLANT

VS.

CAUSE NO. 2007-CA-00914

SAM D BURT and  
KIM M. BURT

APPELLEES

STATEMENT OF DEBORAH DUNN, CIRCUIT CLERK OF  
CALHOUN COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI  
COUNTY OF CALHOUN

Personally came and appeared before me, the undersigned authority, Deborah Dunn, Circuit Clerk of Calhoun County, Mississippi, who first being duly sworn, stated as follows:

In the above-styled cause, which was Cause No. C2004-165, in the Circuit Court of Calhoun County, Mississippi, I was the Circuit Clerk and remain the Circuit Clerk of Calhoun County at this time.

\$25,000 was pled into Court by one of the Defendants in the lower court.

On December 5, 2006, Judge Henry L. Lackey entered an Order for the disbursement of the \$25,000.00, with one-third (1/3) being applied to attorney's fees, one-third (1/3) to the Plaintiffs, Sam D. Burt and wife, and the balance to St. Paul Travelers Insurance Company, being one-third (1/3). A copy of Judge Lackey's Order of December 5, 2006, is attached and asked to be made a part hereof. The Order is marked "Exhibit A" to my testimony.

On the same day, Judge Lackey entered an Order setting aside his prior order of disbursement, pointing out that this matter had been assigned to Judge Howorth and, therefore, the Order directing disbursement of interpled funds was set aside. A copy of the Order setting aside Judge Lackey's Order of disbursement is attached hereto and marked "Exhibit B."





Thereafter, on May 3, 2007, Judge Andrew K. Howorth entered his Order directing that the \$25,000 would be disbursed with one-third (1/3) applied to attorney's fees, one-third (1/3) paid to the Plaintiffs, Sam D. Burt and wife, Kim M. Burt, with the balance of one-third (1/3) to be paid the St. Paul Travelers Insurance Company.


Judge Howorth's Order of May 3, 2007, was filed on May 5, 2007, as evidence a copy attached hereto and being marked "Exhibit C" to my testimony.

Shortly thereafter, in accord with the Order of Judge Howorth, disbursement was made of the \$25,000. Each of those checks have been cashed or deposited to the accounts of the respective payees, including St. Paul Travelers Insurance Company.

According to my records, two of the checks, numbers 1357 and 1358, cleared my bank account during the month of May, 2007; St. Paul Travelers Insurance Company's check number 1359 cleared on June 1, 2007.

The Appellant, St. Paul Travelers Insurance Company, did not obtain an order prohibiting the disbursement of funds nor was a supercedes bond filed in this cause.

WITNESS MY SIGNATURE, this the 26<sup>th</sup> day of October, 2007.

  
DEBORAH DUNN, Circuit Clerk of  
Calhoun County, Mississippi

SWORN TO AND SUBSCRIBED BEFORE ME, this the 26<sup>th</sup> day of October, 2007.



  
NOTARY PUBLIC

My Commission Expires:

Commission Expires  
Oct. 31, 2011

IN THE CIRCUIT COURT OF CALHOUN COUNTY, MISSISSIPPI

SAM D. BURT AND  
KIM M. BURT

PLAINTIFFS

VS.

CAUSE NO. C2004-165

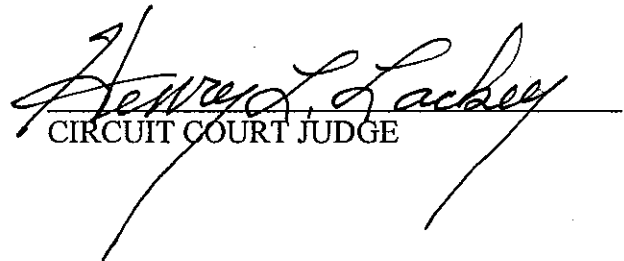
JAMES L. EASLEY AND ROGER CLEMENTS

DEFENDANTS

ORDER

Upon Motion for Disbursement of Interpled Funds in the amount of \$25,000.00, the Court finds that one-third or 33 1/3% should be applied toward attorney's fees, one-third or 33 1/3% will be paid to Sam D. Burt and Kim M. Burt, and the balance to St. Paul Travelers Insurance, being one-third or 33 1/3%.

SO ORDERED this 5<sup>th</sup> day of December, 2006.

  
CIRCUIT COURT JUDGE


FILED

DEC 05 2006

DEBORAH DUNN  
CIRCUIT CLERK  
CALHOUN COUNTY, MS  
MINUTE BOOK A 57 PAGE 469



CERTIFIED COPY

  
CIRCUIT CLERK, CALHOUN CO., MS  
12/5/06  
DATE

IN THE CIRCUIT COURT OF CALHOUN COUNTY, MISSISSIPPI

SAM D. BURT AND  
KIM BURT

PLAINTIFFS

VS.

CAUSE NO. C2004-165

JAMES L. EASLEY AND  
ROGER CLEMENTS

DEFENDANTS

ORDER SETTING ASIDE PRIOR ORDER

On today, the 5<sup>th</sup> day of December, 2006, the undersigned executed an Order directing the disbursement of funds that had been interpled into this Court. That this Order was executed without first checking with the Court's Administrator, the Court having remembered having a hearing on this matter previously and the Court having been advised that the funds in question had been interpled into this Court.

That when the Order was exhibited to the Administrator for docketing, the undersigned was informed that this matter had been Noticed for Hearing on tomorrow, the 6<sup>th</sup> day of December, 2006 before the Honorable Andrew Howorth in Houston, Mississippi.

Therefore, since this matter had been assigned to Judge Howorth, the undersigned should not have considered the matter and should not have executed the Order directing disbursement of funds.

WHEREFORE, the prior Order of this Court directing the disbursement of the interpled funds in this matter is hereby set aside, declared null and void and held for naught.

ORDERED THIS THE 5<sup>TH</sup> DAY OF DECEMBER, 2006.

  
HENRY L. LACKEY-CIRCUIT JUDGE

By Facsimile to: Michael Reed Martz, Esq. 662-234-9762) 12/5/06 @ 4:31 p.m.  
John P. Fox, Esq. 662-456-3303)

**FILED**

DEC 05 2006

DEBORAH DUNN  
CIRCUIT CLERK  
CALHOUN COUNTY, MS  
MINUTE BOOK 452 PAGE 470



IN THE CIRCUIT COURT OF CALHOUN COUNTY, MISSISSIPPI

SAM D. BURT and  
KIM M. BURT

PLAINTIFFS

v.

CAUSE NO. C2004-165

JAMES L. EASLEY, ROGER CLEMENTS and  
MISSISSIPPI FARM BUREAU INSURANCE COMPANY

DEFENDANTS

---

ORDER

---

Upon Motion of the parties for Disbursement of Interpled Funds in the amount of \$25,000.00, the Court having considered the matter on the briefs filed by the parties without the necessity of a Hearing, finds as follows: that one-third, or 33 1/3%, shall be applied toward attorney's fees; one-third, or 33 1/3%, shall be paid to the Plaintiffs Sam D. Burt and Kim M. Burt; and, the balance of one-third, or 33 1/3%, shall be paid to St. Paul Travelers Insurance Company.

IT IS THEREFORE ORDERED that the Clerk of the Court shall distribute the funds being held in its registry as follows: \$8,333.33 to John Fox, Esq.; \$8,333.34 to the Plaintiffs; and, \$8,333.33 to St. Paul Travelers Insurance Company. Upon completion of this action, this matter is fully and finally dismissed with prejudice.

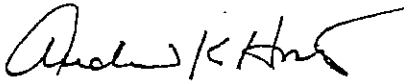
The Clerk is directed to provide a copy of this Order to all Counsel.

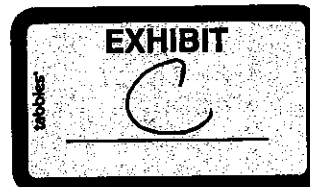
SO ORDERED this the 3rd day of May, 2007.

FILED

MAY 05 2007

DEBORAH DUNN  
CIRCUIT CLERK  
CALHOUN COUNTY, MS  
MINUTE BOOK 459 PAGE 332

  
ANDREW K. HOWORTH  
CIRCUIT COURT JUDGE



BURT-WC.5.3.07.wpd

IN THE SUPREME COURT OF MISSISSIPPI

ST. PAUL TRAVELERS' INSURANCE COMPANY

APPELLANT

V.

CAUSE NO. 2007-CA-00914

SAM D. BURT AND  
KIM M. BURT

APPELLEES

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CERTIFICATE OF DELIVERY

---

I, John P. Fox, certify pursuant to Rule 25(a) of the Mississippi Rules of Appellate Procedure that on the 29th day of October, 2007, I hand delivered to the Mississippi Supreme Court Clerk the original and three copies of the Brief of Appellees.

SO CERTIFIED, this the 29th day of October, 2007.

  
\_\_\_\_\_  
JOHN P. FOX