

**IN THE MISSISSIPPI SUPREME COURT**

**ST. PAUL TRAVELERS' INSURANCE COMPANY**

**APPELLANT**

**v.**

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

**SAM D. BURT and  
KIM M. BURT**

**APPELLEES**

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**BRIEF OF THE APPELLANT**

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**ON APPEAL FROM THE CALHOUN COUNTY CIRCUIT COURT**

**ORAL ARGUMENT NOT REQUESTED**

M. REED MARTZ (MSB NO. [REDACTED])  
MARKOW WALKER, P.A.  
265 N. LAMAR BLVD, SUITE I  
POST OFFICE DRAWER 50  
OXFORD, MISSISSIPPI 38655-0050  
(662) 234-9899  
COUNSEL FOR APPELLANT

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**CERTIFICATE OF INTERESTED PERSONS**

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

- Traveler's Insurance Company, formerly St. Paul Travelers Insurance Company, Appellant herein;
- M. Reed Martz, counsel for Appellant;
- Samuel D. Burt, Appellee;
- Kim M. Burt, Appellee;
- John Fox, counsel for Appellees.

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Attorney of Record for St. Paul Travelers Insurance Company

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## **STATEMENT ON ORAL ARGUMENT**

### **Oral Argument Not Requested.**

Travelers believes the issues presented to the Court in this appeal are straightforward legal principles involving statutory interpretation which would not be significantly aided by oral argument.

### **STATEMENT OF THE ISSUE**

1. The issue on appeal is whether the trial court erred in awarding the Claimant an equal share of the interpled funds where the “legal liability” of the carrier was not discharged and thus, per MISS. CODE ANN. § 71-3-71, there was no “excess” to be distributed to the Claimant following the payment of the “reasonable costs of collection.”

## **STATEMENT OF THE CASE**

Samuel D. Burt, one of the appellees herein, was an employee of Bruce Furniture Industries, LLC, on November 15, 2001, and on that date sustained an injury which arose out of, and in the course of, his employment. Specifically, Burt was involved in an automobile accident wherein he was a passenger in a vehicle driven by a co-employee, James Easley, which was struck from the rear by Roger Clements, an insured of Mississippi Farm Bureau Insurance. Bruce Furniture Industries had a policy of worker's compensation insurance provided by St. Paul Travelers Insurance Company and pursuant to said policy, Travelers paid \$27,729.21 (\$7,340.26 in indemnity benefits to Sam Burt and \$20,388.95 for medical services). Record at page 8-9.

Sam Burt, along with his wife who alleged loss of consortium<sup>1</sup>, thereafter brought a tort lawsuit against the other driver, Clements, as well as his co-worker, Easley, and Clement's liability insurer, on November 3, 2004. Record at page 1. Travelers, in order to protect its lien provided by MISS. CODE ANN. § 71-3-71, then filed a motion for leave to intervene (Record at page 4) and was granted leave to file an intervening complaint on May 19, 2005. Record at page 13. Travelers filed its Intervening Complaint on May 24, 2005, and was aligned as a party plaintiff pursuant to MISS. R. CIV. P. Rule 24(a).

By Agreed Order dated October 12, 2004,<sup>2</sup> Mississippi Farm Bureau was dismissed without prejudice. On July 28, 2006, co-employee Easley was also dismissed by agreed order (with

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<sup>1</sup> A purely derivative claim. *Daulton v. Miller*, 815 So. 2d 1237, 1241 (¶17) (Miss. Ct. App. 2001) ("Restated, this means that a spouse has no better claim in court than the primary claimant does.")

<sup>2</sup> The correct date of the order is October 12, 2005, as confirmed by the clerk's filing acknowledgment dated October 14, 2005.

prejudice). Travelers, an intervening Plaintiff, was not consulted prior to the execution of these agreed orders and is unaware of the reasons for said dismissals but suspects they were predicated upon the prohibition against direct actions and the tort immunity granted to co-employees stemming from work-related injuries.

On July 11, 2006, Clements filed a "Petition to Interplead Funds," supporting his motion with allegations that Plaintiffs Sam and Kim Burt had agreed to accept Clements' \$25,000.00 bodily injury liability limits in full satisfaction of their damages. Travelers filed a response to said Petition in which it did not consent to the settlement but also did not oppose it *contingent upon* Travelers being fully reimbursed for its lien pursuant to MISS. CODE ANN. § 71-3-71. A hearing was held on this matter on August 14, 2006, and Travelers maintained the same position at that time. Transcript at pages 3-5.

Accordingly, on August 16, 2006, the trial court entered an order finding that although a settlement agreement had been reached between the Plaintiffs, Sam and Kim Burt, and the Defendant, Roger Clements, said settlement could not be completed due to the continuing dispute between the Burts and Travelers over Travelers' right to reimbursement (or at least the extent of its reimbursement). Record Excerpts at page 6-7. Record at page 14-15. The Court ordered the parties to interplead the funds into the Court's registry and execute satisfactory releases of Clements and his insurer. *Id.* Defendant Clements was dismissed with prejudice on this date, leaving only the Burts and Travelers in the suit. *Id.*

Following several hearings which were continued by the trial judge *ex parte*, the Court entered a scheduling order requiring briefs to be filed in both this subject action as well as the appeal of the Claimant's worker's compensation case from the Mississippi Worker's Compensation

Commission by February 15, 2007.<sup>3</sup> The Plaintiffs filed a brief on February 20, 2007, and Travelers filed its brief on February 26, 2007. The trial court then entered an order on May 3, 2007, distributing the interpled funds in thirds to the Plaintiff's attorney, Plaintiffs and Travelers. Record Excerpts at page 9. Record at page 17. It is from this order that Travelers appeals.

On May 10, 2007, Travelers filed an "Emergency Motion to Reconsider, or Alternatively, Motion to Stay Dispersement of Funds." This motion was subsequently denied orally by the trial court.

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<sup>3</sup> As implied, Sam Burt's worker's compensation claim stemming from the accident at issue was dismissed with prejudice by the MWCC on November 22, 2005, and this order was affirmed by the Circuit Court on April 30, 2007. No brief was ever filed in the Circuit Court by the claimant during the approximately one and one-half years it was pending. The underlying worker's compensation claim had been dismissed due to the Claimant's failure to actively prosecute his case and his later failure to timely motion for reinstatement, such that the MWCC was without jurisdiction to consider the matter further.

## **SUMMARY OF THE ARGUMENT**

The unanimous holdings of the Mississippi Supreme Court make manifest that a carrier's right to subrogation is absolute and must be strictly applied. MISS. CODE ANN. § 71-3-71. This Court has held that the "the statute ***unambiguously*** provides that after deducting the costs of collection and attorneys fees ***any*** recovery from a third party (whether by award or through settlement) ***must*** be first applied to repay the workers' compensation carrier for benefits it paid the claimant. This Court has said that the statute "must be ***strictly interpreted according to its mandatory language***, has ***uniformly and consistently*** applied the statute and required reimbursement." *Federated Mutual Ins. Co. v. McNeal*, 2004-CA-02450-SCT, ¶ 8 (Miss. 2006) (emphasis added).

In this matter, Traveler's lien totaled \$27,729.21, yet the trial court awarded \$8,333.33 to the Plaintiffs while the "legal liability" of Travelers still constituted \$19,395.88. Travelers was entitled to be fully reimbursed before any funds were distributed to the claimant and thus the trial court's disbursement was error.

## ARGUMENT

### A. *Standard of Review*

There having been no factual issues presented to the trial court, the trial court's decision should be reviewed de novo. *Davis v. Hoss*, 869 So. 2d 397, 401 (¶10) (Miss. 2004).

### B. *Travelers was Entitled to Everything But Reasonable Costs of Collection*

The proper order of distribution for the interpled funds is set out by statute and should have been strictly observed. Plaintiff Sam Burt received worker's compensation benefits in the amount of \$27,729.21<sup>4</sup> as a result of the accident, and pursuant to MISS. CODE ANN. § 71-3-71, Travelers has a lien in that amount against any third party recovery Sam Burt may receive.

MISS. CODE ANN. § 71-3-71 provides in relevant part:

If such employer or insured join in such action, they shall be entitled to repayment of the amount paid by them as compensation and medical expenses from the net proceeds of such action (after deducting the reasonable costs of collection) as hereinafter provided. . . . any amount recovered by the injured employee or his dependents (or legal representative) from a third party shall be applied as follows: reasonable costs of collection as approved and allowed by the court in which such action is pending, or by the commission of this state in case of settlement without suit, shall be deducted; the remainder, or so much thereof as is necessary, shall be used to discharge the legal liability of the employer or insurer; and any excess shall belong to the injured employee or his dependents.

The unanimous holdings of the Mississippi Supreme Court make manifest that a carrier's right to subrogation is absolute and must be strictly applied. *See Federated Mutual Ins. Co. v. McNeal*, 2004-CA-02450-SCT, ¶ 8 (Miss. 2006). In *McNeal*, which affirmed the proposition that the "made whole rule" does not apply to the employer and carrier's statutory lien, the Mississippi Supreme Court said:

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<sup>4</sup> Burt has previously argued that Travelers can only recover the indemnity benefits paid. This is incorrect. "Compensation" includes medical benefits as well. MISS. CODE ANN. §§ 71-3-15(4); § 71-3-71, ¶ 1.

Thus, the statute **unambiguously** provides that, after deducting the costs of collection and attorneys fees, **any** recovery from a third party (whether by award or through settlement) **must** be first applied to repay the workers' compensation carrier for benefits it paid the claimant. This Court, stating that the statute must be **strictly interpreted according to its mandatory language**, has **uniformly and consistently** applied the statute and required reimbursement. *See, e.g., Miss. Power Co. et al v. Jones*, 369 So.2d 1381, 1387 (Miss. 1979) ("statute is plain and unambiguous."); *Litton Sys., Inc. v. Murphree*, 301 So.2d 850, 852-53 (Miss. 1974) (statute means "exactly what it says; that is that the employer and insurer are entitled to recover compensation paid."); *Merchant's Co. v. Hutchinson*, 199 So.2d 813, 815 (Miss. 1967) ("Mississippi law is clear and unambiguous on the procedure to be followed by the employer or its insurer in intervening or joining in the cause of action. It is equally clear and unambiguous in setting forth the mandatory distribution to be made of any amount recovered."). In *Mississippi Food and Fuel Workers' Compensation Trust v. Tackett*, 778 So.2d 136, 143 (Miss. 2000), this Court noted that "Section 71-3-71, insofar as it creates a right of reimbursement to a workers [sic] compensation carrier, has existed in essentially unchanged form since the adoption of workers' compensation laws in this State in 1948."

*McNeal*, 2004-CA-02450-SCT at ¶ 8 (emphasis added).

As no basis for the trial court's one-third split was contained in its May 3, 2007 Order, there is nothing in the record to support any deviation from the clear language of the statute. Therefore, Travelers is entitled to the entire \$8,333.33 distributed to Sam Burt and also anything above "reasonable costs of collection."

### **CONCLUSION**

The trial court erred in awarding anything to the Plaintiffs as Travelers was not fully reimbursed. This Court should therefore reverse and remand the trial court's May 3, 2007 Order, and direct the Plaintiffs to return the \$8,333.33 they received from the Court's registry. It is further prayed that this Court award Travelers all costs and expenses of this appeal.

Respectfully submitted,

ST. PAUL TRAVLERS INSURANCE COMPANY

BY: MARKOW WALKER, P.A.



M. REED MARTZ (MSB NO [REDACTED])

MARKOW WALKER, P.A.  
265 N. LAMAR BLVD, SUITE I  
POST OFFICE DRAWER 50  
OXFORD, MISSISSIPPI 38655-0050  
(662) 234-9899  
COUNSEL FOR APPELLANT


CERTIFICATE OF SERVICE

I do hereby certify that I have this day mailed, by first-class U.S. mail, postage paid, a true and correct copy of the above and foregoing ***Brief of the Appellant*** to:

John Fox, Esq.  
Fox Law Firm  
P.O. Box 167  
Houston, MS 38851  
*Attorney for Plaintiffs*

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

This the 26<sup>th</sup> day of July, 2007.

  
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M. REED MARTZ