

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-CA-01263

WILLIAM J. LEITCH, JR.

APPELLANT

VERSUS

**MISSISSIPPI INSURANCE GUARANTY
ASSOCIATION, JACK L. DILLARD AND
H-G & F CO., INC.**

APPELLEES

BRIEF OF APPELLANT

**APPEALED FROM THE CIRCUIT COURT
OF DESOTO COUNTY, MISSISSIPPI
CAUSE NO. CV2004-0195**

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ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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 this Court may evaluate potential disqualifications or refusal.

1. The Honorable Judge Robert Chamberlin
1. Clifford Whitney, III, Esq.

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Sara B. Russo, MSB No. [REDACTED]

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STATEMENT OF POSITION REGARDING ORAL ARGUMENT

The Plaintiff/Appellant respectfully requests oral argument. This appeal presents complicated facts and legal issues, and an oral argument would be beneficial to this Court and to the parties. The Plaintiff/Appellant therefore respectfully submits that oral argument would be appropriate in this case.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF OF APPELLANT

COMES NOW, the Plaintiff/Appellant, William J. Leitch, Jr., by and through counsel, and files this his Brief of Appellant. The Plaintiff/Appellant would state unto the Court that as a matter of law factual issues remain which must be resolved by a jury. Therefore, the granting of summary judgment was improper.

I.

STATEMENT OF ISSUE

Did the trial court err in granting the motion for summary judgment filed by the Defendant/Appellee Mississippi Insurance Guaranty Association (hereinafter "MIGA") when it decided as a matter of law that Plaintiff/Appellant's claim for which he seeks compensation from Defendant/Appellee was a covered claim and that the exhaustion provision of Miss. Code Ann. § 83-23-123 is applicable to Plaintiff/Appellant's uninsured motorist benefits. The standard of review for this issue is de novo. See *Jackpot Miss. Riverboat, Inc. v. Smith*, 874 So. 2d 959, 960 (Miss. 2004).

II.

STATEMENT OF THE CASE

On or about March 22, 1999, Plaintiff/Appellant filed suit against Jack L. Dillard and H-G & F Co., Inc. arising from an automobile accident. (R. 6) On or about July 23, 2002, Plaintiff filed an Amended Complaint adding State Farm Mutual Automobile Insurance Company (hereinafter "State Farm") as a defendant. (R. 20-24). State Farm provided uninsured motorist coverage for the Plaintiff/Appellant, the total of which coverage amounted to \$300,000.00. *Id.* In the Amended Complaint, Plaintiff/Appellant

sought judgment in the amount in excess of \$3,000,000.00 from the defendants and for the policy limits of his uninsured motorist coverage in the amount of \$300,000.00 from State Farm. *Id.* Subsequently, in June 2004, a settlement was reached between State Farm and the Plaintiff/Appellant for the amount of \$300,000.00. *Id.* Presently, Plaintiff/Appellant still has his claims against Dillard and H-G & F. *Id.* H-G & F Co., Inc. was a Mississippi corporation that has been administratively dissolved as of December 30, 2003. *Id.* At all times complained of Jack L. Dillard was employed by H-G & F Co., Inc. *Id.*

On or about August 20, 2004, Plaintiff/Appellant filed a Complaint and Request for Declaratory Judgment against the Defendant/Appellee Mississippi Insurance Guaranty Association (hereinafter "MIGA") seeking a declaratory judgment from the Circuit Court of Desoto County declaring that MIGA's laws applied to Plaintiff/Appellant's claims and that any award received from Plaintiff/Appellant's uninsured motorists coverage did not offset a potential award from MIGA. (R. 5- 8). MIGA filed its answer on or about October 12, 2004. (R. 9-19).

On or about October 17, 2005, Plaintiff/Appellant filed an Amended Complaint and Request for Declaratory Judgment adding Jack L. Dillard and H-G & F Co., Inc. as Defendants. (R. 20-24). MIGA filed its answer to the Amended Complaint on or about October 31, 2005. (R. 25-29). On December 22, 2006, Defendant/Appellee MIGA moved for summary judgment. (R. 30-33). Plaintiff/Appellee responded to MIGA's motion on January 25, 2007. (R. 34-38). A hearing was held on Defendant/Appellee MIGA's motion for summary judgment on June 7, 2007. (R. 43). The trial court took the motion under advisement and granted it on or about June 26, 2007. (R. 43-45). The

Plaintiff/Appellant timely perfected this appeal. (R. 47-51).

III.

STATEMENT OF FACTS

On or about January 19, 1998, Plaintiff/Appellant, William J. Leitch, Jr. was traveling east on U.S. 78 in Desoto County. (R. 5- 8). Jack L. Dillard, an employee of H-G & F Co., Inc., had pulled his eighteen-wheeler onto the shoulder of east bound U.S. 78 to inspect his vehicle. (R. 5- 8). As Plaintiff/Appellant was traveling east along U.S. 78, Dillard, suddenly and without warning pulled out in front of Plaintiff/Appellant, causing him to collide into the rear of the eighteen-wheeler trailer, which resulted in injuries and damages to Plaintiff/Appellant Leitch. (R. 5- 8). The owner of the eighteen-wheeler, H-G & F Co., Inc., had its liability insurance with Reliance Insurance Co., which is an insolvent insurance company. (R. 5- 8).

The purpose of the Mississippi Insurance Guaranty Association Law “is to provide a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer[,]” and these provisions “shall be liberally construed to effect the purpose.” *See* Miss. Code. Ann. § 83-23-103 and § 83-23-107.

Adhering to the purpose of Mississippi Insurance Guaranty Association Law, Plaintiff/Appellant, Leitch, sought a declaratory judgment from the trial court declaring that the Mississippi Insurance Guaranty Association laws apply to Plaintiff/Appellant Leitch’s claims against defendants and that any award received from Plaintiff/Appellant’s uninsured motorists coverage does not offset a potential award from

Mississippi Insurance Guaranty Association. (R. 5- 8).

IV.

SUMMARY OF THE ARGUMENT

Summary judgment was not proper. Plaintiff/Appellant Leitch is entitled to coverage under the Mississippi Insurance Guaranty Association Law since it is to be liberally construed to protect individuals like Appellant Plaintiff Leitch from financial loss and due to the ambiguity in the statutory provisions, Miss. Code Ann. § 83-23-109(f) and Miss. Code Ann. § 83-23-123(1) and in light of the Mississippi Supreme Court's decision in *Mississippi Ins. Guar. Ass'n v. Cole ex rel. Dillon* , 954 So. 2d 407 (Miss. 2007); therefore, Defendant / Appellee Mississippi Insurance Guaranty Association's (hereinafter "MIGA") Motion for Summary Judgment should be have been denied by the trial court.

V.

ARGUMENT

The purpose of the Mississippi Insurance Guaranty Association Law (hereinafter "The Guaranty Act") "is to provide a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer." Miss. Code Ann. § 83-23-103. A covered claim under MIGA is defined as the following:

An unpaid claim, including one of unearned premiums, which arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this article applies issued by an insurer, if such insurer becomes an insolvent insurer and (1) the claimant or insured is a resident of this state at the time of the insured event, provided that for entities other than

an individual, the residence of a claimant or insured is the state in which its principal place of business is located at the time of the insured event; or (2) property from which the claim arises is permanently located in this state. "Covered claim" shall not include any amount awarded as punitive or exemplary damages; or sought as a return of premium under any retrospective rating plan; or due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries or otherwise and shall preclude recovery thereof from the insured of any insolvent carrier to the extent of the policy limits.

Miss. Code Ann. § 83-23-109(f). Plaintiff/Appellant Leitch's claim is undisputedly a covered claim.

After a claimant proves he has a "covered claim", he must prove that the recovery under The Guaranty Law is not duplicated. Miss. Code Ann. § 83-23-123(1), provides as follows:

Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer, which is also a covered claim, shall be required to exhaust first his right under such policy. Any amount payable on a covered claim under this article shall be reduced by the amount of any recovery under such insurance policy.

Under this non-duplication requirement, a claimant must first exhaust any benefits he may be entitled to recover under an insurance policy issued by a solvent insurer. Second, according to the statute, MIGA is entitled to an offset from its obligations any amounts received by a claimant from another insurer. As noted by Defendant/Appellee MIGA, neither the Mississippi legislature or courts have addressed whether this offset / exhaustion provision applies to UM insurance and despite Defendant's/Appellee's contention, Miss. Code Ann. § 83-23-123(1) is not clear and unambiguous. The statute uses general terms and does not state that it applies to UM insurance.

Furthermore, Miss. Code Ann. § 83-23-109(f) and Miss. Code Ann. § 83-23-123(1) are

ambiguous and directly conflict with each other, and as this Court is aware, when insurance statutes are ambiguous, under the rules of construction, the Court is to interpret the statutes in favor of coverage. “Any ambiguities in an insurance contract must be construed against the insurer and in favor of the insured and a finding of coverage.” *Nationwide Mut. Ins. Co. v. Garriga*, 636 So. 2d 658, 662 (Miss. 2004) (citing *Government Employees Ins. Co. v. Brown*, 446 So. 2d 1002, 1006 (Miss.1984) and *Monarch Ins. Co. of Ohio v. Cook*, 336 So. 2d 738, 741 (Miss.1976)).

Miss. Code Ann. § 83-23-109(f) defines a covered claim as an unpaid claim of an insolvent insurer. A covered claim requires that the insurer be insolvent. However, Miss. Code Ann. § 83-23-123(1), which is the offset/exhaustion provision, states that the covered claim cannot be a policy of the insolvent insurer. These two statutory provisions hopelessly conflict with each other. Applying the offset provision, as it is written, Plaintiff/Appellant would have to exhaust any other solvent insurance policies of Defendants/Appellees, and no such policies exist in this case. Plaintiff's/Appellant's UM insurance is not Defendants'/Appellees' insurance, and as such, Plaintiff/Appellant is not required to exhaust it and MIGA is not entitled to an offset from UM insurance. Interestingly, in *Mississippi Ins. Guar. Ass'n v. Byars*, 614 So. 2d 959 (Miss. 1993), *infra*, MIGA did not even argue that it was entitled to an offset, which further supports Plaintiff/Appellant Leitch's position that MIGA is not entitled to an offset from his UM insurance.

The Mississippi Supreme Court has had an occasion to look at the purpose of the Guaranty Law and to determine how this law should be applied. In *Mississippi Ins. Guar. Ass'n v. Byars*, 614 So. 2d 959 (Miss. 1993), the plaintiff sued two defendants, and both defendant's liability insurance carriers were insolvent. The Kansas Insurance Guaranty Association settled

the claim for one of the defendants for \$600,000. The court found MIGA to apply to the second defendant's insolvent insurance carrier and required MIGA to pay the statutory maximum of \$300,000. The Mississippi Supreme Court noted that "[t]he guaranty law statutes are to be liberally construed in order to achieve the purpose of protecting the public or claimants against financial loss because of the insolvency of insurers". *Byars*, 614 So. 2d at 963. By so doing, the Mississippi Supreme Court found the awards did not offset each other because it was two separate insolvent insurance companies, and the plaintiff received the \$300,000 from MIGA. Applying this rationale to the present case, MIGA is not entitled to an offset from Plaintiff/Appellant Leitch's recovery from his uninsured motorists coverage, and instead, Plaintiff/Appellant Leitch is entitled to receive coverage up to \$300,000 from MIGA. Although Mississippi has not directly answered the question of whether or not MIGA is entitled to an offset from uninsured motorists insurance, the intent of the Mississippi Supreme Court to liberally construe the Guaranty Law and to protect the claimant from financial loss due to an insolvent insurance company is demonstrated in *Byars*. The Guaranty Law does not specifically address UM insurance and whether or not MIGA is entitled to a credit/offset when a claimant recovers from their insurance. Therefore, applying the Court's rationale in *Byars*, The Guaranty Law should be construed to not allow Defendant/ Appellee MIGA an offset from Plaintiff/Appellant, William Leitch, UM insurance in order to protect him from an unfair financial loss.

In Plaintiff's/Appellant's Amended Complaint, Plaintiff/Appellant Leitch seeks judgment in the amount in excess of \$3,000,000.00 from the Defendants/Appellees and for the policy limits of his uninsured motorist coverage in the amount of \$300,000.00 from State Farm. In June 2004, a settlement was reached between State Farm and the Plaintiff/Appellant for the amount of

\$300,000.00. Plaintiff/Appellant still has his claims against Defendant Dillard and Defendant H-G & F, and a jury could easily find that the Plaintiff's/Appellees damages exceeded \$300,000.00. Therefore, the Plaintiff/Appellant could experience a significant financial loss if he is unable to recover any funds from Defendant/Appellee MIGA, which this directly contradicts the purpose of the Guaranty Law.

Although this Court has not yet specifically addressed the application of the exhaustion statute to payments by a claimant's uninsured motorist carrier, this Court's recent decision in *Mississippi Ins. Guar. Ass'n v. Cole ex rel. Dillon*, 954 So. 2d 407 (Miss. 2007), provides guidance on this issue.

In *Cole*, the Court held that under the Mississippi Insurance Guaranty Act Association Law, the claims against the doctor and practice group (who had solvent insurance) were not a "covered claim" as defined by Miss. Code Ann. § 83-23-109(f), and thus under the law's exhaustion provision, Miss. Code Ann. § 83-23-123(1), the plaintiff was not required to first exhaust her rights under the insurance policy covering the doctor and practice group before seeking recovery from MIGA, which was defending the hospital after its insurer became insolvent. The Court further held that any recovery by the plaintiff from the insurer for doctor and practice group would not reduce the recovery from MIGA. The Court also held that any recovery under a solvent insurance policy is not reduced since the claim is not a covered claim, and as such MIGA was not entitled to an offset.

The facts of this case are identical to the facts in *Cole*. The Plaintiff/Appellant, Leitch, received payment from his own insurance company under the uninsured motorists provision, which by Miss. Code Ann. § 83-23-109(f) is not a covered claim, and the exhaustion provision, Miss. Code Ann. § 83-23-123(1), is not applicable. As such, MIGA is not entitled to an offset

Defendant/Appellee MIGA more than likely will contend that a distinction needs to be made between a joint tortfeasor's insurance policy and uninsured/underinsured policy. This Court has held the following:

The purpose of the uninsured motorist provision is to provide the insured means of collecting that to which he is legally entitled for bodily injuries caused by accident arising out of the ownership, maintenance and use of an uninsured automobile. This provision must be construed from the perspective of the injured insured, from whose standpoint a tort-feasor operating an automobile with no insurance available is an uninsured motorist. It is all the same to him whether there is no insurance at all, or a policy that is incapable of being applied to satisfy his claim because the tort-feasor's insurer lawfully disclaims liability.

Hodges v. Canal Ins. Co., 223 So. 2d 630, 634 (Miss. 1969).

In light of this fact, the distinction made by Defendant/ Appellee MIGA's counsel is meaningless, and the Court's decision in *Cole* applies. The fact of the matter is that in light of the decision in *Cole*, Defendant/Appellee MIGA is not entitled to a credit. The same logic that applied in *Cole* applies to the present case, and based on this logic, a different conclusion than that which this Court reached in *Cole* cannot be reached in this case.

Further, the funds received from State Farm were a result of an insurance contract purchased by the Plaintiff/Appellant for uninsured motorist benefits, which constitute a collateral source and for which no offset would be allowed to the Defendant/Appellee.

VI.

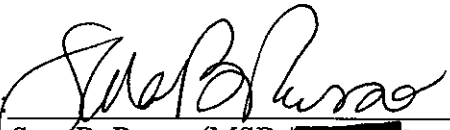

CONCLUSION

The Mississippi Insurance Guaranty Association laws apply to Plaintiff/Appellee William Leitch, Jr.'s claims against Defendants/Appellants and any award received from Plaintiff's/Appellee's uninsured motorists coverage does not offset a potential award from

Mississippi Insurance Guaranty Association. As a matter of law, factual questions existed which precluded the granting of summary judgment; therefore, the Plaintiff/Appellant would respectfully request that this cause be reversed and remanded for a trial on the merits.

Respectfully submitted,

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By: 
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CERTIFICATE OF SERVICE

I, Sara B. Russo, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to:

Honorable Robert P. Chamberlin
Circuit Court Judge
P.O. Box 280
Hernando, MS 38632-0280

Clifford C. Whitney, III
Varner, Parker & Sessums, P.A.
P.O. Box 1237
Vicksburg, Mississippi 39181-1237

This, the 21st day of March, 2008.



Sara B. Russo